1988

Norman Barber and Helen Barber, husband and wife v. The Emporium Partnership, et al. v. N. George Daines, and Daines and Kane : Brief of Appellant

Utah Supreme Court

N. George Daines; Daines and Kane; Attorneys for Appellee.
Raymond N. Malouf; Malouf Law Offices; Attorneys for Appellants.

Recommended Citation

Brief of Appellant, *Barber v. The Emporium Partnership*, No. 880410.00 (Utah Supreme Court, 1988).
https://digitalcommons.law.byu.edu/byu_sc1/2355

IN THE SUPREME COURT OF THE STATE OF UTAH

NORMAN BARBER and HELEN BARBER,)
husband and wife,)
Plaintiffs/Appellees,)
)
vs.)
)
THE EMPORIUM PARTNERSHIP, et al.) Case No. 880410
Defendants and)
Third Party Plaintiffs/Appellants) Priority [illegible]
)
vs.)
)
N. GEORGE DAINES, and DAINES)
AND KANE,)
Third Party and Counterclaim)
Defendants/Appellees.)

BRIEF OF APPELLANTS

APPEAL FROM AN ORDER OF THE FIRST DISTRICT [illegible]
FOR CACHE COUNTY, UTAH,
JUDGE VENOY CHRISTOFFERSEN

N. George Daines, Esq.
DAINES & KANE
Attorneys for
Plaintiff/Appellee
108 North Main, Suite 201
Logan, Utah 84321

Raymond N. Malou[illegible] Esq.
MALOUF LAW OFFIC[illegible]
Attorneys for
Defendants/Appel[illegible]nts
250 East 200 Nor[illegible], Suite D
Logan, Utah 8432[illegible]

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N. George Daines, Esq.
DAINES & KANE
Attorneys for
Plaintiff/Appellee
108 North Main, Suite 201
Logan, Utah 84321

Raymond N. Malouf, Esq.
MALOUF LAW OFFICES
Attorneys for
Defendants/Appellants
250 East 200 North, Suite D
Logan, Utah 84321

LIST OF PARTIES

The following parties are directly involved in the appeal from the Partial Summary Judgment:

PLAINTIFF:

Norman Barber and Helen Barber,
husband and wife,

DEFENDANT:

The Emporium Partnership, a
Utah Limited Partnership:

Individual Alleged Partners:
Von K. Stocking,
Don A. White, Jr.
Raymond N. Malouf, Jr.

THIRD PARTY AND COUNTERCLAIM DEFENDANTS:

N. George Daines
Daines & Kane

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Section 15-1-4 — 9,18,19,20,42

Interest on judgments.

Any judgment rendered on a lawful contract shall conform thereto and shall bear the interest agreed upon by the parties; which shall be specified in the judgment; other judgments shall bear interest at the rate of 12% per annum.

Section 15-4-3 — 29

Payments by Obligor.

The amount of value of any consideration received by the obligee from one or more of several obligors, or from one or more of joint or of joint and several obligors, in whole or in partial satisfaction of their obligations shall be credited to the extent of the amount received on the obligation of all co-obligors to whom the obligor or obligors giving the consideration did not stand in the relation of a surety.

Section 15-4-4 — 17,26

Release of co-obligor - Reservation of Rights.

Subject to the provisions of §15-4-3, the obligee's release or discharge of one or more of several obligors, or of one or more of joint or of joint and several obligors, shall not discharge co-obligors against whom the obligee in writing and as part of the same transaction as the release or discharge expressly reserves his rights; and in the absence of such a reservation of rights shall discharge co-obligors only to the extent provided in §15-4-5.

Section 15-4-5 — 17,26

Release of co-obligor - Effect of knowledge of obligee.

If an obligee releasing or discharging an obligor without express reservation of rights against a co-obligor then knows or has reason to know that the obligor released or discharged did not pay as much of the claim as he was bound by his contract or relation with that co-obligor to pay, the obligee's claim against that co-obligor shall be satisfied to the amount which the obligee knew or had reason to know that the released or discharged obligor was bound to such co-obligor to pay.

If an obligee so releasing or discharging an obligor has not then such knowledge or reason to know, the obligee's claim against the co-obligor shall be satisfied to the extent of the lesser of two amounts, namely: (a) the amount of the fractional share of the obligor released or discharged, or (b) the amount that such obligor was bound by his contract or relation with the co-obligor to pay.

Section 38-9-1 36

Liability of person filing wrongful lien.

A person who claims an interest in, or a lien or encumbrance against, real property, who causes or has caused a document asserting that claim to be recorded or filed in the office of the county recorder, who knows or has reason to know that the document is forged, groundless, or contains a material misstatement or false claim, is liable to the owner or title-holder for $1,000 or for treble actual damages, whichever is greater, and for reasonable attorney fees, and costs as provided in this chapter, if he willfully refuses to release or correct such document of rcord within 20 days from the date of written request from the owner or beneficial title-holder of the real property. This chapter is not intended to be applicable to mechanics' or materialmen's liens.

Section 48-1-12(2) 12

Nature of partner's liability.

All partners are liable:

(1) Jointly and severally for everything chargeable to the partnership under Sections 48-1-10 and 48-1-11.

(2) Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract.

Section 48-1-30 14

General effect of dissolution on authority of partner.

Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership.

(1) With rspect to the partners:

(a) when the dissolution is not by the act, bankruptcy or death of a partner; or

(b) when the dissolution is by such act, bankruptcy or death of a partner in cases where Section 48-1-31 so requires.

(2) With respect to persons not partners as declared in Section 48-1-32.

Section 57-1-3 26

Grant of fee simple presumed.

A fee simple title is presumed to be intended to pass by a conveyance of real estate, unless it appears from the conveyance that a lesser estate was intended.

Section 78-12-22 30

Within eight years.

Within eight years an action upon a judgment or decree of any court of the United States or of any state or territory within the United States, an action to enforce any liability due or to become due, for failure to provide support or maintenance for dependent children.

Section 78-12-25 30

Within four years.

Within four years, (1) an action upon a contract, obligation or liability not founded upon an instrument in writing; also on an open account for goods, wares and merchandise, and for any article charged in a store account; also on an open account for work, labor or services rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received. (2) An action for relief not otherwise provided for by law.

Section 78-12-26 30

Within three years.

Within three years:

(1) An action for waste, or trespass upon or injury to real property; except that when waste or trespass is committed by means of underground works upon any mining claim, the cause of action does not accue until discovery by the aggrieved party of the facts constituting such waste or trespass.

(2) An action for taking, detaining, or injuring personal property, including actions for specific recovery thereof; except that in all cases where the subject of the action is a domestic animal usually included in the term "livestock," which at the time of its loss has a recorded mark or brand, if the animal strayed or was stolen from the true owner without the owner's fault, the cause does not accrue until the owner has actual knowledge of such facts as would put a reasonable man upon inquiry as to the possession of the animal by the defendant.

(3) An action for relief on the ground of fraud or mistake; except that the cause of action in such case does not accrue until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

(4) An action for a liability created by the statutes of this state, other than for a penalty or forteiture under the laws of this state, except where in special cases a different limitation is prescribed by the statutes of this state.

(5) An action to enforce liability imposed by §78-17-3, except that the cause of action does not accrue until the aggrieved party knows or reasonably should know of the harm suffered.

Section 78-27-56 37

Attorney's fees - Award where action or defense in bad faith.

In civil actions, where not otherwise provided by statute or agreement, the court may award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith.

Section 78-32-3 38,40

In immediate presence of court; summary action - Without immediate presence; procedure.

When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily, for which an order must be made, reciting the facts as occurring in such immediate view of contempt, and that he be punished as prescribed in §78-32-10 hereof. When the contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators or other judicial officers.

Section 78-32-10 38,40,41

Judgment.

Upon the answer and evidence taken the court or judge must determine whether the person proceeded against is guilty of the contempt charged, and if it is adjudged that he is guilty of the contempt, a fine may be imposed upon him not exceeding $200, or he may be imprisoned in the county jail not exceeding thirty days, or he may be both fined and imprisoned; provided, however, that a justice of the peace may punish for contempt by a fine not to exceed $100 or by imprisonment for one day, or by both such fine and imprisonment.

Section 78-32-11 40

Damages to party aggrieved.

If an actual loss or injury to a party in an action or special proceeding prejudicial to his rights therein, is caused by the contempt, the court in addition to the fine or imprisonment imposed for the contempt or in place thereof, may order the person proceeded against to pay the party aggrieved a sum of money sufficient to indemnify him and to satisfy his costs and expenses; which order and the acceptance of money under it is a bar to an action by the aggrieved party for such loss and injury.

Rules

Utah Rules of Civil Procedure:

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Process. Time of issuance and service.

If an action is commenced by the filing of a complaint, summons must issue thereon within three months from the date of such filing. The summons must be served within one year after the filing of the complaint or the action will be deemed dismissed, provided that in any action brought against two or more defendants in which personal service has been obtained upon one of them within the year, the other or others may be served or appear at any time before trial.

Rule 11 11,37,38,39,40

Signing of pleadings, motions, and other papers, sanctions.

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name who is duly licensed to practice in the state of Utah. The attorney's address also shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 14 30

Third-Party Practice.

(a) When defendant may bring in third party.

At any time after commencement of the action a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than ten days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of transaction or occurrence that is the subject matter of the plaintif's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. A third-party defendant may proceed under this

Rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

(b) When plaintiff may bring in third party.
When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitled a defendant to do so.

Rule 69(c) 21

Execution and proceedings supplemental thereto. When writ to be returned.
The writ of execution shall be made returnable at any time within two months after its receipt by the officer. It shall be returned to the court from which it issued, and when it is returned the clerk must attach it to the record.

Rule 69(e)(4) 27

(4) Purchaser refusing to pay.
Every bid shall be deemed an irrevocable offer; and if the purchaser refuses to pay the amount bid by him for the property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss is occasioned thereby, the party refusing to pay, in addition to being liable on such bid, is guilty of a contempt of court and may be punished accordingly. When a purchaser refuses to pay, the officer may also, in his discretion, thereafter reject any other bid of such person.

Rule 69(g)2 27

(2) Where purchaser fails to obtain possession of property or is dispossessed thereof or evicted therefrom.
Where, because of irregularities in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, or because of the reversal or discharge of the judgment, a purchaser of property sold on execution, or his successor in interest, fails to obtain the property or

> is dispossessed thereof or evicted therefrom, the court having jurisdiction thereof shall, on motion of such party and after such notice to the judgment creditor as the court may prescribe, enter judgment against such judgment creditor for the price paid by the purchaser, together with interest. In the alternative, if such purchaser or his successor in interest, fails to recover possession of any property or is dispossessed thereof or evicted therefrom in consequence or irregularity in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, the court having jurisdiction thereof shall, on motion of such party and after such notice to the judgment debtor as the court may prescribe, revive the original judgment in the name of the petitioner for the amount paid by such purchaser at the sale, with interest thereon from the time of payment at the same rate that the original judgment bore; and the judgment so revived shall have the same force and effect as would an original judgment of the date of the revival.

Cases

JURISDICTION STATEMENT

The Supreme Court has jurisdiction to hear this appeal under Rule 3, Rule of the Utah Supreme Court; under U.C.A. §78-2-2(3)(i); and because of the trial court's bench ruling October 4, 1988 (TR2, 36, 39), and the formal Rule 54(b) order signed December 27, 1988, where the court stated that all its rulings in the case and the Partial Summary Judgment were final orders from which an appeal could be taken from all of the court's decisions on the First Cause of Action, the Counterclaim, the Amended Counterclaim and the Third Party Complaint.

STATEMENT OF ISSUES PRESENTED ON APPEAL

I.

ONE GENERAL PARTNER AND THE PARTNERSHIP WERE NOT SERVED, SO THE COURT SHOULD NOT HAVE RENEWED THE JUDGMENT.

May a joint judgment against the limited partnerhip and three general partners be renewed without serving the partnership trustee and one of the general partners, where the partnership has assets and judgment is not joint and several, but only "joint"?

II.

THE RENEWAL JUDGMENT SHOULD NOT CONFLICT WITH THE UNAMENDED ORIGINAL JUDGMENT.

May a judgment be renewed for more than the amount the original judgment allowed, where the original judgment was never amended, even by writs of execution, and the new judgment conflicts with the first judgment?

III.

THE CREDITOR HAS TO EQUITABLY OFFSET AMOUNTS RECEIVED, AND LEGALLY OFFSET AMOUNTS BID.

May a judgment be renewed for amounts the creditor has already equitably received because of his judgment; or be renewed for amounts the creditor legally bid at execution sale for all of the right of one defendant, when that right turns out to be less than the creditor hoped?

IV.

THE REST OF THE CASE SHOULD NOT PROCEED AGAINST DEFENDANTS NOT PARTIES TO THE 1979 JUDGMENT.

Did the court lack jurisdiction or abuse its discretion by allowing Plaintiffs to add additional parties, who were not defendants to the 1979 judgment, more than eight years after the 1979 judgment?

V.

THE MATERIAL ISSUES OF FACT PROHIBIT SUMMARY JUDGMENT.

Did the amended Counterclaim and Third Party Complaint present genuine issues of disputed fact, making the partial summary judgment and other orders an abuse of discretion?

VI.

THERE WAS NEITHER A LEGAL NOR A FACTUAL BASIS TO SUPPORT SANCTIONS.

May the Court order sanctions, without first making supportive findings, where there is neither a legal nor a factual basis for sanctions?

STATEMENT OF THE CASE

The Barbers originally filed suit in January, 1979 seeking payment of a promissory note signed in November, 1977 by Von K. Stocking and Don A. White, Jr., as general partners of the Defendant Emporium Limited Partnership, a Utah Limited Partnership. Addendum Item 1, Barber v. Emporium, 750 P.2d 202 (1988) and its Record, and the Record herein, hereinafter "R", 149-157. Plaintiff only requested a judgment against the partnership, those general partners, and Raymond N. Malouf, Jr., for:

> " . . . the principal sum of $15,000, interest thereon of $2,180.88 to date hereof, plus interest additional at the rate of 12% per annum until judgment, plus court costs herein expended and reasonable attorney's fees as may be awarded by the court. (Addendum Item 1)

Regarding interest, the prayer of the Complaint alleged only that the full amount of the $15,000 note was due, "plus interest to date hereof in the amount of $2,180.88." The Complaint did not allege or pray for interest after the judgment. (Addendum Item 1, R 208-210.)

The Plaintiff's attorney in that First Action (R p.11, lines 7-9) filed a Motion for Judgment on the pleadings without changing the pleadings or amending the prayer. Barber's counsel admitted the wording is deficient. (R 208). In the judgment granted April 18, 1979, the trial court ordered:

> . . . that the Plaintiffs have recovered judgment against the Defendants in the (note) amount of $15,000, plus accrued interest at the rate of 12% from date hereof, until paid in the amount of $2,180.88, attorney's fees in the amount of $4,000, and court cost in the amount of $31.30. (Addendum Item 2, R 208-210.)

The judgment did not provide for interest after the judgment, and interest after the judgment had not been prayed for in the Complaint. (Addendum Item 1.) Objections were made by the Defendants who contested several items, including the attorney fee award (the Affidavit on fees was never sent to the Defendants, Record in case 870128-CA 23; 57).

The Emporium Limited Partnership eventually filed for bankruptcy protection. (R pp.6; 4-17; 27-38, Addendum Item 4.) The partnership is still in dissolution. The bankruptcy has not been concluded because the partnership has judgments and claims to collect against others. (Emporium v. Millenium Corp, Supreme Court Case Nos. 20273; 20282, Summary Decision finally resulted in an amended judgment of $158,835.83.)

Barbers never sought to lift the automatic stay in bankruptcy against the Partnership (R pp.6, 20, 28-9). They attempted collection against the general partners. They did not consider themselves successful.

Barbers prepared several writs of execution (Record in Case 870128-CA. pp.148-9, 158-9, 209, 262-5). (Record in case 870128-CA pp.58-9; 206-14; 241-9; 259-65; 282-5). Defendants argued the judgment should not allow accrual of interest after judgment. The

Complaint did not ask for post-judgment interest. The judgment actually fixed the interest at a specific amount until paid. (Similar arguments were made in this case, R pp.30-2, 176, 203-218, 223, 229-230, 237.) When the court denied the last Motion to Quash the writs, the Defendants appealed. After the 1979 judgment would have expired, February 12, 1988 the Utah Court of Appeals ruled (No. 870128 CA, 750 P.2d 202, Barber v. Emporium Partnership; R 148-151), that the appeal was untimely because the Defendants waited too long after the last writ to appeal. The court did not say the un-appealed writs amended the 1979 judgment. In the meantime, Plaintiffs filed an action to renew the judgment, which is the subject of this appeal.

Barbers filed their Complaint to renew the original judgment March 27, 1987, less than a month before the 8 year statute of limitations ran on the 1979 judgment. (R 1-3). Defendants Von K. Stocking (R p.27) and Raymond N. Malouf, Jr. moved to dismiss (R 4-17, 27-38) for lack of jurisdiction: (1) over the Defendant partnership, both because the Trustee was not served and because the automatic stay was still in effect (facts both admitted by the Plaintiffs, R p.20); (2) because the court had no authority to award additional sums for additional attorney's fees, interest after the original judgment, and certain costs which had not been provided for in the original judgment; and (3) because the Plaintiffs should have been required to satisfy most or all of the original judgment from various collection efforts or equitable receipts. (R pp.4-17; 27-38). One general partner, Don A. White, Jr., was not served with the renewal Complaint and did not appear.

(R 4, 5, 27, 62, 237-8). No summons was served on Mr. White.

Defendants' Motion to Dismiss the Renewal Complaint was denied (R 43-49). Defendants requested permission to file an Interlocutory Appeal, but did not obtain permission to bring an Interlocutory Appeal at that time. (R 50-61, Supreme Court Case No. 870232).

Defendants Stocking and Malouf, the only Defendants who were served, filed an Answer and Counterclaim. (R 62-65). Thereafter, Plaintiffs amended the Complaint (R 66-70) without notice to Defendants (R 70) and without prior court approval. (R 93-95, 106-107). The original Complaint for a new judgment became the First Cause of Action (R 66). The Second and Third Causes of Action attempted to join relatives and lien holders of the general partners in an attempt to partition property once partly owned by one general partner which Plaintiffs had executed on and bid for, but in which that general partner had no interest. (R 66-70, 73-78, 108). Barbers also filed a lis pendens pertaining to certain property. (R 79).

The Defendants' Motion to Strike the Amended Complaint on both procedural and jurisdictional grounds (R 93-102; 106-112; Addendum Item 9) prompted Plaintiffs to Move For Permission to Amend, after the fact (R 103). Defendants' comprehensive arguments (R 105-112) were denied without any analysis by the trial court. (R 113). Thereafter, Defendants Amended their Answer and Counterclaim, and added a Third Party Claim against the Plaintiffs' counsel. (R 114-120).

Just before this appeal (R 260-2), Plaintiffs moved for

Partial Summary Judgment. (R 123-138). Defendants set forth 14 separately numbered material issues of fact relating to the First Cause of Action, which were apparent from the pleadings, and filed two affidavits (R 163-171; 172-184; 203-218; Addendum Items 10 and 11). Plaintiffs had not identified any uncontested facts. (R 203).

August 22, 1988 the trial court issued a Memorandum Decision (R 219-20) granting Plaintiffs' Motion for Partial Summary Judgment on the First Cause of Action, and dismissing the Counterclaim, the Amended Counterclaim, and Third Party Complaint. The court's decision said all the issues had already been settled, but did not say where. (R 219, 229, 240). The record is devoid of the court's analysis to settle the issues. (R 229; Transcript of proceedings, No.25616, Oct. 3, 1988, hereinafter "TR", pp. 26-36). The Decision gratuitously judged the Defendants' counsel to be in contempt of the court. (R 219). (There were no prior orders on the subject, R 231-2) for "continuously pursuing actions that he knows have been decided" and ordered payment of attorney fees for the contempt in the amount of $3,000. Without making true or correct findings (R 228-32; 240-1), the trial court and Plaintiffs' counsel restructured the contempt language of the court's Memorandum Decision into a judgment for sanctions, entered October 4, 1988. (R 246-250). The Amended Counterclaim, the Counterclaim, and the Third Party Complaint (R 114-120) were dismissed with prejudice as part of the Partial Summary Judgment, October 4, 1988 (R 255), leaving the only remaining issues the Plaintiffs' Second and Third Causes of Action (R 66-70); and the Defendants' Amended Answer (R 114-120).

The court also ruled that all previous orders of the court pertaining to the Complaint, Amended Complaint, Counterclaim, Amended Counterclaim, and Third Party Complaint were final and appealable orders under Rule 54(b), U.R.C.P., (Addendum Item 7; TR 39, lines 15-17), and that there was no just reason for delay in filing the Appeal. The Rule 54(b) Order was signed December 27, 1988.

Notice of Appeal was filed November 2, 1988 (Addendum Item 8, R 260-261) by Defendants Von K. Stocking and Raymond N. Malouf, Jr. Defendant Don A. White, Jr. appeared specially and solely to the extent necessary to appeal the orders which may apply to him, but he maintains that the court otherwise lacked jurisdiction over him in this case because he was not served. (R 224-8; 237-240).

Defendants appealed the Partial Summary Judgment, the court's Order granting sanctions, and the court's dismissal of the Counterclaim, Amended Counterclaim and Third Party Complaint. (R 260-1). Defendants also appealed from the trial court's order of June 18, 1987 (related to the First Cause of Action) denying the Defendants' Motion to Dismiss (for failure to join the partnership as a party; for lack of jurisdiction over the subject matter because the Plaintiffs tried to have a new judgment renewed for more than the original judgment; and for failure to state a legal claim for relief because the Plaintiff should have satisfied all or most of the judgment because of legal requirements or equitable offsets. (R 4-17; 27-38; 43-47). The Memorandum Decision of September 16, 1987 (R 113), denying Defendants' Motion to Strike the Amended Complaint (R 93-112) is also claimed to be an error.

Appellants argued that material and disputed facts exist, which are marshalled here in summary fashion. Appellants request the Partial Summary Judgment to be set aside, and the Plaintiffs' case dismissed. The factual and legal issues should be resolved in accordance with arguments made by the Defendants opposing entry of the judgment. (R 221-241; Addendum Item 12).

SUMMARY OF ARGUMENTS

I.

The Partial Summary Judgment exceeds the trial court's discretion. The original judgment was not joint and several, but only joint. The law requires that for judgment to be obtained jointly, all of the persons or entities who might be liable must be made parties and be joined in the action. One of the general partners, Don A. White, Jr., was not separately served with the Complaint and Summons. He has not appeared except to appeal. The Emporium Partnership is in bankruptcy. The Trustee was neither named as a party nor was the Partnership separately served. The Defendants raised these issues and alleged the court lacked jurisdiction to renew the 1979 judgment.

II.

The original (1979) judgment is limited to the relief pleaded for and requested by the prayer. Judgment was given after a Motion for Judgment on the pleadings, was limited to these pleadings. The Complaint was to enforce performance of a contractual promissory note. The note provided for interest on the debt, but Plaintiff failed to plead for post-judgment interest. The judgment itself fails to provide for interest after the judgment. Defendants never needed to appeal that issue, since interest was not allowed to Barbers in the judgment. This is not the type of a judgment which is included within "other judgments" which will bear interest at 12% per annum, referred to in U.C.A. §15-1-4.

This is a judgment based on a contract and U.C.A. §15-1-4 requires that any judgment on a contract shall specify the interest in the judgment. This one didn't. The judgment was never amended before it expired. A writ of execution does not amend the judgment.

III.

The creditor actually has possession of the former residence of Mr. and Mrs. Von K. Stocking, and an equitable reduction in the claim is required. After the 1979 judgment, Stockings defaulted in payments to First Federal Savings & Loan. Barber's attorney negotiated directly with Mr. Stocking (R 15-18) to buy the house and take both Mr. and Mrs. Stocking's equity in the house to satisfy part of the 1979 judgment. Because of Barber's interest, First Federal did not allow Stockings to cure the default. Barbers purchased First Federal Savings & Loan's beneficial interest and went ahead with the advertised trust deed sale. Plaintiffs now say it was an "arms length" transaction, but Stockings are entitled to an equitable offset for the value of their equity in the home. Barbers have refused to give it. (R 179-184). Barber's attorney wrote letters (R 14) in which Plaintiffs expressed minimum and maximum values. The equity is easily calculated between about $11,000 and $27,000. However, not one dollar was allowed by Barbers.

Barbers also noticed for sale and bid $20,000 at an execution sale for all of the right, title and interest of Raymond N. Malouf, Jr. in a residence his wife owns. (R 172-178). Mr. Malouf had no equity in the house because of prior mortgages and assignments of mortgages. This was pointed out to the Barbers before they had their execution sale, but they bid anyway. Legally, the Barbers are obligated to credit the judgment by the amount of their bid. (R 33-36).

IV.

Even though this Complaint is solely allowed to renew a judgment, Plaintiff tried to join relatives of Mr. Malouf, to litigate issues of priority of mortgages and assignments on property (R 66-70), by amending the Complaint. The amendment to the Complaint was made after the eight year statute of limitation on the 1979 judgment ended. (R 66). The issues are res judicata because of a prior order made April 24, 1987, in Case No. 17630. (R 17630, pp. 379-381). The court abused its discretion in allowing Plaintiffs to join persons not parties to the original judgment, and against which the Plaintiff had no cause of action. (R 94-99). The 1979 judgment, if it gave the Barbers any potential claim against the property, no longer allowed a claim after the judgment expired. The judgment lien, if any, joining third parties in the renewal action, lapsed with the lapsing of the judgment. The judgment lien did not gain legitimacy by the Plaintiffs' exercise of an execution sale. Having the sale does not create an interest where there was no interest. (R 172-8).

V.

Material issues of disputed fact were adequately set forth by the Defendants herein, and were before the trial court. (R 163-184;

203-218). The court abused it discretion in denying Defendants the right to have those facts decided in a trial.

VI.

The court gratuitously decided to find counsel for Defendants in contempt for raising the same issues which still exist. (R 219; 228-232). The court called this an Order for Sanctions. (R 246-8). Whatever it is called, there was neither a legal basis (because there was no prior order which was violated, and no Rule 11 violation), nor a factual basis for sanctions.

Appellants have marshalled all the facts to support the trial court by references to the record and related cases in the Case Statement, Summary and Argument. However, the facts to support the court's statements that these issues have been resolved already (R 219; TR 1-3) simply do not exist. The record shows numerous efforts to invite the trial court to fairly apply the law to the case, but it misapprehended the true facts and incorrectly recalled the pleadings.

ARGUMENT

I.

ONE GENERAL PARTNER AND THE PARTNERSHIP WERE NOT SERVED, SO THE COURT SHOULD NOT RENEW THE JUDGMENT

This case presents a due process question of whether the Emporium Partnership and its general partners are entitled to application of both common law and statutory requirements that a creditor proceed against the partnership before proceeding against general partners. It also presents the due process question of whether a renewal judgment can be entered against a partnership and against a general partner who have not been made parties to the action.

The Barbers sued to renew the 1979 judgment less than a month before the eight year statute of limitations expired. They did not, however, serve one of the general partners and did not serve the partnership. There were three alleged general partners. Only two of them were served. As these filed their appearances and answers, they specifically denied that they were appearing for the third, Don A. White, Jr. The 1979 judgment is not joint and several. The new Partial Summary Judgment specifically provides only for joint liability. The distinction is significant, and arises from both statutory and common law. Utah law, U.C.A. §48-1-12(2) provides in this instance that general partners are liable jointly, rather than jointly and severally.

A liability is said to be joint and several when the creditor may sue one or more of the parties to such liability separately, or all of them together at his option. Joint liability is used to express a common liability incurred by two or more persons. It is one in which the obligors bind themselves jointly, but severally, and which must therefore be prosecuted in a joint action against them all; and is thus distinguished from a "joint and several" obligation. (See Blacks Law Dictionary, Revised Fourth Edition 1968, p. 972). This rule is generally followed. A judgment entered against partners after service of process on less than all of them will not be given the effect of personal judgment against partners not actually served. A judgment against a partner not served is totally void. Dillard v. McKnight, 209 P.2d 387, 34 C.2d 209 (Cal. 1949); and L.C. Jones Trucking Company v. Superior Oil Co., 234 P.2d 802, 68 Wyo. 384 (Wyo. 1951). Service on one general partner may sometimes confer jurisdiction against the partnership itself. Diamond Nat. Corp. v. Thunderbird Holding, Inc., 454 P.2d 13, 85 Nev. 271 (1969). However, this partnership is in dissolution and Barbers did not try to serve it. (R 20).

This court has ruled that when suing jointly, all the persons or entities who might be liable must be brought into the suit. Palle v. Industrial Commission, 79 U. 47, 7 P.2d 284 (1932). It has also held that the requirements of Rule 4, Utah Rule of Civil Procedure are jurisdictional. Garcia v. Garcia, 712 P.2d 288 (Utah 1986). The Emporium Partnership was not subject to judgment where summons was only served on individual general partners for two reasons. First, the 1979 judgment was joint, not joint and several, so to renew the judgment, jurisdiction has to be obtained over all defendants. This includes the partnership and all general partners. This partnership was in dissolution. While all of the potential defendants were named, service was only attempted on Stocking and Malouf. The other alleged general partner, White, was not served and jurisdiction was never obtained to enter a judgment against him. The defendants all needed to be sued in their individual capacities, just as this court required in Madsen v. Borthick, 97 Utah Adv. Rep. 13, at 14 (Dec. 12, 1988).

The second reason the partnership is not subject to a judgment is that the partnership was the beneficiary of the automatic stay order required by 11 U.S.C. §362. Suit is precluded until Plaintiffs have lifted the stay. Barbers admitted (R 20; 28-30) it was not lifted. The partnership's legal representative is the bankruptcy trustee, who was never a party, and never served. The partnership's dissolution came because of the bankruptcy, U.C.A. §48-1-28(5), the authority of any partner to act for the partnership has been dissolved, so a general partner could not be served for the partnership. See U.C.A. §48-1-30. The trustee alone could act for the partnership.

Recently this court confirmed the importance of the distinction between joint and joint and several liability. It also made it clear that a partnership is an entity separate from its partners. In McCune & McCune v. Mt. Bell Telephone, 758 P.2d 914, 87 Utah Adv. Rep. 9, (Utah 1988) partners in a law firm were jointly, rather than jointly and severally, liable for debts not arising from tort or breach of trust. The court further concluded that since the debt was contractual in origin, common law required the partnership's assets be marshalled and exhausted, to the extent any exist, before the partnership creditor could reach partner's individual assets. Id. at 11. Where Barbers did not even serve the Emporium Partnership, it was obviously not their intent to do this. If partnership debts must be satisfied by partnership assets, to the extent any exist, before a creditor can seek satisfaction from the assets of a partner, judgment must also be against the partnership.

The original judgment was entered against the general partners and the Emporium Limited Partnership. The Emporium Partnership was not served in this action. The Defendant partnership is alleged to have assets. The court has never found that it does not have assets. The McCune decision should control this case. In both, the meaning of joint liability is raised. By not serving the partnership, Plaintiffs failed to obtain jurisdiction over the partnership. The McCune court said:

> It is true that under general partnership law, all partnership debts are joint debts of the partners and that all partners are ultimately liable for those debts. However, a creditor's right to proceed against the individual partners is conditioned on having first proceeded against the partnership assets for satisfaction of the debt, something Mountain Bell did not do in this case. Therefore, Mountain Bell claims the right to do under tariff precisely what it could not otherwise do legally - pursue a partner's assets first.

Similarly, by not serving Don A. White or the partnership, Barbers failed to cause the court to obtain jurisdiction over either the partnership or all of the general partners who might be secondarily liable. Under any theory, the partnership itself is not now a party, but should be. Unserved partners of the dissolved partnership are not parties merely because they were partners.

Joint liability means a creditor cannot proceed against one defendant without joining all defendants. (R 223-8; 237-240). The court abused its discretion in allowing judgment to enter against the two general partners who were served, since the other joint obligors were not served. It abused it discretion again by allowing any judgment to enter when the partnership itself was never made a party.

Utah Rule of Civil Procedure 4(b) requires that a summons <u>must</u> be served within one year of filing the complaint. It has been more than a year since the Renewal Complaint was filed. Is it too late to serve the partnership or Don A. White, Jr.? The Rule also provides that where some defendants have been served, others may be served or appear anytime before trial. In this case, the court made its decision without allowing trial. Absence of an actual trial is not fatal to the question of whether "trial" has occurred. <u>Moon Lake Electric Assoc. v. Ultrasystems Western Constructors, Inc.</u>, 99 Utah Adv. Rep. 25 (Dec. 1988). Therefore, the partnership and the other general partner can no longer be served, and the judgment, made final by the trial court, should be considered void and unenforceable. The <u>L.C. Jones Trucking Company</u> court said:

> Although there are statutes authorizing judgments against two or more joint debtors upon service of summons on but one of them, the general rule is that it is improper to render judgment against all the obligors where the court has not acquired jurisdiction over some of them. A judgment so rendered is void as against the parties over whom the court has no jurisdiction. L. C. Jones Trucking Co. v. Superior Oil Co., 234 P.2d 802 (Wyo. 1951), at 808.

Failure of Barbers to serve Don A. White should alternatively be considered equivalent to the release of a co-obligor and the results governed by U.C.A. §15-4-4 and §15-4-5. Barber's claim should thus be deemed satisfied to the amount Don White was bound to pay. Don White's share of the debt - at least one-third - (R 226; No. 17630, R 256) should be subtracted from the claim allowed. If Plaintiffs are allowed not to proceed against all joint obligors, they must still be required to first satisfy any debt from partnership assets, to the extent these exist.

A joint judgment against a limited partnership and three general partners cannot be renewed without first obtaining jurisdiction over the partnership and all three of the general partners, when the original judgment is joint, and not joint and several. If it is renewed, the partnership's assets must be exhausted first. If judgment is allowed to stand on appeal, it should only be enforceable against the partnership if jurisdiction has somehow been obtained. If it is not satisfied, Plaintiffs should seek a deficiency against the general partners, but only if they can all still be sued.

II.
THE RENEWAL JUDGMENT SHOULD NOT CONFLICT WITH THE UNAMENDED ORIGINAL JUDGMENT

This case presents the issue of whether a 1979 judgment, never amended, can be materially modified to allow post-judgment interest when a renewal judgment is requested in 1987. Within this issue is the question of whether a judgment can accrue interest under U.C.A. §15-1-4, where the judgment arises from a contract, but the judgment failed to provide for the contract interest. Not only are those facts true, but (1) the judgment allowed only a certain amount, $2180, as the total judgment interest "until paid"; and (2) that amount is all the Complaint asked for. The Complaint did not allege the right to interest after the judgment. Even if §15-1-4 doesn't mean what it says, Barber's pleadings were defective.

The original judgment merged the promissory note contract into the judgment. In renewing the judgment, Barbers are limited to the judgment. They cannot refer to the terms of the note. It is too late to amend the judgment.

Yergensen v. Ford, 15 U.2d 397, 402 P.2d 696 (1965), held that a prior note merged into the judgment, and no longer existed. Gossner v. Dairymen Associates, Inc., 611 P.2d 713 (Utah 1980) cites Yergensen, in a dissent by Justice Hall, to make res judicata the assertion of claims which should have been raised in a prior action. "Where the parties and issues are the same and there is a judgment on the merits, all claims of right from the original cause of action are extinguished and the right represented by the judgment is substituted therefore." Id, at 718. Likewise, Barbers are stuck with the limits of their judgment. Barber's 1979 judgment was defective on its face, and they admitted (R 208) they have to rely on U.C.A. §15-1-4 to get post-judgment interest. This section should not save them. A new judgment cannot be improved by referring to the note. While the note allowed interest after judgment, the judgment itself did not provide for it. Barbers are therefore not renewing, they are trying to increase the amount the judgment allowed. They and the trial court pretend the judgment allows something it does not allow.

What does the statute say? U.C.A. §15-1-4 requires shall any judgment based on a contract, such as a promissory note, specify on its face the amount of interest that is allowed. (R 209, 210). Only other judgments, those not based on contracts, may accrue interest whether or not the judgment provides for interest. Additionally, even if this judgment were not based on contract, post-judgment interest should not be allowed because of the defects in the prayer of the Complaint. The Record herein, pp. 208-9, recites:

> November 12, 1986, the Plaintiffs admitted in pleadings filed in this court in Civil No. 17630, that the judgment was "not as clear" as it should be, but they wanted to rely on a State statute to have interest on this judgment anyway. Mr. Daines said:
>
> > Although the judgment language is not as clear as one would like, Plaintiffs believe it is sufficiently clear that State law provides that all judgments require interest and that it does not need to be restated in each judgment which is filed by the court. (Response to Motion, November 12, 1986, Civil No. 17630). (R 17630, p. 267).
>
> That is an admission the judgment does not support post-judgment interest. Plaintiffs made the same admission to the Court of Appeals on page 7 of their Respondent's Brief wherein they stated:
>
> > The judgment recites that the interest is at 12% but does not specifically state that it continues to accrue after rendition of the judgment. Id, page 7, Case No. 870128-CA.

> Of course the Appeals Court did not address the issue on the merits, but the admission proves Defendants' point. Plaintiffs justify the omission and their accrual of the interest by relying on Dairy Distributors, Inc. v. Local 976, 12 U. 2d 85, 396 P. 2d 47 (1964) and Section 15-1-4 U.C.A. to argue the merits of their claim. They also try to explain what must have been intended by the inclusion of the figure $2,180 for interest, and the language "from the date hereof". They explain that it must have meant from a period before the judgment entered until the date of judgment. They specifically say "the date hereof" must mean the date of the Complaint. That's probably true, but the fact remains the judgment is deficient. It does not allow accrual of post-judgment interest. The judgment has never been amended.

The only way to change the amount of money allowed by a judgment is to amend the judgment. Richards v. Siddoway, 24 U.2d 314, 471 P.2d 143 (1970). (R 210-11). However, amending a judgment requires formal action. Certain steps must be followed. The time within which a court may act to modify a judgment is limited. A long list of Utah decisions dating from 1895 support the position that the only basis for changing the amount of money allowed by a judgment is for the judgment itself to be amended. A longer time is allowed for amending clerical errors than judicial errors.

Richards, supra, is often referred to for the distinction between judicial and clerical errors. The problem with the original judgment in this case is not clerical: from wrongly recording the judgment as made. Although the defects in the Complaint and judgment may not have been intended, the words in the judgment are consistent with the Complaint. There was, at most, a judicial error. This does not mean that the judge erred in entering the judgment, but that there was error in the judgment itself. Richards held that a judicial error can only be cured by a timely motion for a new trial, amended findings, appeal, or a new action. The longest possible time limit for any of this would have been a new action, based on the note, within six years of the date on the note, or by May 11, 1984. It is now too late to pursue any of those remedies. The error wholly belongs to the Barbers and their counsel. The prayer did not ask for post-judgment interest. The judgment does not provide for post-judgment interest. Any interpretation that it does would allow a judgment in excess of the prayer.

The trial court's entry of various writs of execution did not amount to an amendment of the original judgment. Judgments cannot be amended by misquoting them. Any writs of execution lasted up to two months from issuance [Rule 69(c)] and certainly all would have expired when the judgment expired anyway. The Barber's sole option for a renewal is to rely solely upon the language of the 1979 judgment, assuming they have jurisdiction and are entitled to more money.

Defendants did bring up the issue of post-judgment interest in Barber v. Emporium, 750 P.2d 202 (1988), when contesting the enforceability of one of Barber's writs for more than the judgment allowed. The Supreme Court said raising the issue on the appeal of that writ was untimely, because the motion to quash the writ had been denied more than 30 days before the appeal was filed. However, even by allowing the disputed writ, the trial court did not amend the judgment.

Trial courts do not have authority to unilaterally change a judgment even if they want to prefer one party. In Benson v. Anderson, 14 Utah 334, 47 P. 142 (1896) this court said that judicial tribunals may not exercise revisionary power over a judgment after it has passed away from the judge. There, an effort to change a judgment only six months after it was entered was considered too late. In Frost, et al. v. District Court, et al., 96 Utah 106, 83 P.2d 737 (1938) this court also said " . . . after the time for appeal has expired, the court has no power to modify a judgment in a substantial or material respect. This is well settled law."

Thus, the original trial court has no right to amend the 1979 judgment. It and the Barbers never attempted to do so. Each interpreted it by their hopes; not its words. Just because the Plaintiffs seek to renew that judgment does not give the trial court any authority to modify the original judgment. Even if partial summary judgment of some kind were appropriate, the trial court has abused its discretion in allowing the modifications. There was no appeal, no motion for a new trial, no new action, and no timely modification attempt. Any renewal judgment is limited like the 1979 judgment is limited.

The trial court obviously believed the issues presented by Defendants had been decided already by the Appeals Court (TR 2, lines 14-25; 26 lines 25-36). In order for a matter to be res judicata and Defendants' arguments either claim barred or issue barred, the parties or their privies, must be the same; the claim alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action; the issue in both cases must be identical and have been fully, fairly and competently litigated in the first action; and the judgment must be final. Madsen v. Borthick, 97 Utah Adv. Rep. 13 (Dec. 12, 1988) at 14 and 16.

Did the post-judgment interest issue meet the Madsen test? No. Since the Plaintiffs did not allege post-judgment interest, it was not presented. Should the Plaintiff have presented it? Yes, if Plaintiffs wanted post-judgment interest. Was it fully litigated when the 1979 judgment was entered? No, because it was not presented to the court by the party who had an interest in getting post-judgment interest. Should it have been raised by the Plaintiff at that time? Yes. The Plaintiffs who had the burden, did not even try to amend the judgment to provide for post-judgment interest.

Perhaps the Plaintiffs assumed they could have post-judgment interest. However, their judgment resulted from a motion for judgment on the pleadings. Their pleadings, consisting of the Complaint, did not ask for post-judgment interest. Rule 8, Utah Rules of Civil Procedure, requires the Plaintiff to demand all the relief to which he deems himself entitled. An exhibit to a pleading cannot serve the purpose of supplying material averments or be taken as part of the allegations of the pleading itself. Girard v. Appleby, 660 P.2d 245 (Utah 1983). The Plaintiff never attempted to amend the pleadings and has never alleged they asked for post-judgment interest.

The court did recognize, as early as September 1986, that it was too late to change the judgment to a different amount. (R Case No. 17630, p. 252). That is when the court denied Defendants' Motion to Quash a writ of execution. The court completely misapprehended Defendants' Motion objecting to the amount Plaintiffs claim was due under their writ, as an effort by the Defendants to change the amount of the judgment. All the Defendants were trying to do was to cause the court to recognize the limitations of the 1979 judgment, and restrict the Plaintiff to the amount shown thereby. Somehow, the court and the Plaintiffs erroneously believed that Defendants had a burden to change the amount of the judgment. The point is, the judgment never allowed the amounts Plaintiffs claim for it in their writs.

III.

THE CREDITOR HAS TO EQUITABLY OFFSET AMOUNTS RECEIVED, AND LEGALLY OFFSET AMOUNTS BID

This case presents the question of whether the creditors' unconditional bid for "all of the right and interest" of a debtor, when the debtors' interest is worth less than the bid, must be credited on a judgment. Also at issue is whether equitable offsets, for property the creditor took because of his judgment, must be applied to reduce the judgment.

Appellants first discuss the equitable offset Barbers should be required to make for their acquisition of Mr. & Mrs. Stocking's property. August 29, 1983, Barber's attorney wrote a letter admitting that Mr. Stocking's property was worth between $45,000 and $60,000. (R 14). The letter attests the fact that Barbers believed there was equity in that property which could offset at least part of the judgment. Using the Barber's own admissions in the letter, the equity in Stocking's property was between $11,808.06 and $26,808.06. These figures represent a difference between the high and low values admitted by their letter, and the face amount of the 1979 judgment. The letter said in pertinent part:

> Norm Barber and I have examined the Von Stocking home and believe that its worth would probably be somewhere in the range of $45,000 to $60,000.

Von Stocking's Affidavits (R 15-18; 179-184) explain that Barbers bid $33,191.94 at the trust deed sale for this residence November 4, 1983. His wife owned half the equity. Barbers had no judgment against Mrs. Stocking. His affidavit further shows that Barber's attorney talked with Mr. Stocking several times between October 31st and November 3, 1983, about the fact that the Barbers were particularly interested in getting the value of the difference between the first mortgage to First Federal and the actual value of the house <u>in order to reduce the judgment</u>. (R 179-184; part of Addendum Item 10).

An equitable offset is appropriate. The difference between $33,191.94 (the amount Barbers bid at the foreclosure sale - the actual amount to pay off the first mortgage), and the minimum value for the house stated in Barber's letter of $45,000, amounts to $11,808.06. The difference between their bid of $33,191.94 and $60,000, the Barber's highest estimate of its value, is $26,808.06. Either amount makes a material difference to what was still owed. The trial court abused its discretion in refusing to either allow an equitable offset or Defendants' right to trial on that issue. Clearly a genuine issue of fact was presented. Even as a matter of law, Stockings should have recovered some credit. Von Stocking relied on Mr. Daines' promises. First Federal refused to allow the Stockings to cure the default. "No credit" towards the judgment means Barbers are unjustly enriched. (Stockings filed suit against Barbers for interfering with First Federal, etc., and that case is also being appealed.) The trial court did not make findings as a matter of law or fact Stockings are not entitled to an offset.

This issue presents another alternative to foreclose enforcement of a renewal judgment. Both U.C.A. §15-4-4 and §15-4-5 can be read with U.C.A. §57-1-32. The latter statute allows Barbers only three months after the Stocking residence was sold to seek a deficiency judgment against Mr. Stocking. Barber's failure to seek a deficiency judgment is a waiver against Von Stocking for more money. It thus operates as a release of him as a joint obligor. Because he is released, the judgment cannot be renewed against the other joint obligors since Mr. Stocking could no longer be joined as a party. It may be argued that the deficiency judgment that must be required, if any, only applies to a deficiency to pay the debt for particular real property. However, this action, seeking additional funds from Mr. Stocking after the trust deed sale, is an effort to collect more. Estoppel should extend to this situation, and stop the Barbers from seeking additional funds from Mr. Stocking. If Mr. Stocking can no longer be made a party, since the original judgment was only joint and not joint and several, the Barbers should be considered to have waived their right to seek a renewal judgment.

Now we want to discuss the legal offset. December 3, 1986, the Barbers advertised and sold at auction all the right, title and interest Defendant Malouf had in residential real property. (R 73-78). Mr. Malouf objected to the sale, not on procedural grounds, but on the basis that it was pointless because he had no equity. (R 97; 107-109; 211-214). Nevertheless, Barbers persisted and bid $20,000 at the sale. Rule 69(e)(4) U.R.C.P. provides that failure of a purchaser to pay the bid is contempt of court. Plaintiffs admit they made the bid, but want to be excused under Rule 69(g)(2). However, that rule only allows a purchaser to be exempt from his bid if there are irregularities in the proceedings, or the property sold was not subject to execution and sale. That rule also applies only to third party purchasers, rather than judgment creditor purchasers.

Barbers should be deemed to have waived any defense the property was not subject to execution sale, where they insisted on the sale with full knowledge of claims to no right, title or interest raised by Mr. Malouf. Barbers bid anyway. Barbers have not admitted, alleged, or proven specific irregularities in the sale. They are not entitled to be excused from performance of their bid.

In Randall v. Valley Title, 681 P.2d 219 (Utah 1984) this court required a creditor bidding at a sale to credit the bid to the judgment and discharge the claim to the extent of the bid. The same principal applies here. The trial court abused its discretion by not requiring the same result. This is particularly true where the court actually told Barbers to give the credit in its April 24, 1987 Order in Case No. 17630. (R 213; R Case No. 17630 380).

Requiring credit for the bid merely recognizes the legal principle of "caveat emptor". This concept, as applied to a bid at a sheriff's sales of personal property, was affirmed by the Court of Appeals in Basin Loans, Inc. v. Young, 764 P.2d 239 (Ct. App. 1988). The court affirmed that a horse trailer was purchased subject to a valid prior lien, that the creditor at the execution sale could have known about. The court said:

> A buyer at a sheriff's sale acquires only such interest as the judgment debtor had in the properties sold. Romero v. State, 97 N.M. 569, 642 P.2d 172, 176 (1982).

It follows that if the interest of the debtor is encumbered by a lien, the buyer takes subject to that lien. This is consistent with Kimball v. Salisbury, 19 Utah 161, 56 Pac. 973 (1899). The Rule of caveat emptor applies to purchases at judicial sales, and the purchaser of said property (takes) it subject to all the infirmities of the proceedings of the sale."

The amount Barbers received, or could have received, or are deemed to receive, or equitably received from the Defendants should be credited to the benefit of all the Defendants. This is provided by Utah statute §15-4-3, U.C.A., which says:

> The amount received by the obligee from one . . . of several obligors, or from one or more joint . . . obligors, in whole or in partial satisfaction of _their_ obligations, _shall_ be credited to the extent of the amount received on the obligation of all co-obligors. (Emphasis added).

Plaintiffs must credit the 1979 judgment for amounts they were (1) equitably deemed to receive, and (2) legally deemed to receive because of (1) the trust deed sale, and (2) their bid, _before_ renewing the judgment. _Jorgensen v. Aetna Casualty Co._, 98 Utah Adv. Rep. 32 (Dec. 29, 1988) expresses this principle, although the _Jorgensen_ opinion by Justice Zimmerman deals with debts owed by joint and several debtors.

IV.
THE REST OF THE CASE SHOULD NOT PROCEED AGAINST DEFENDANTS NOT PARTIES TO THE 1979 JUDGMENT

This Complaint was originally filed solely to renew the 1979 judgment. The original judgment was only against the partnership and the alleged three general partners. The court allowed the Complaint to be amended 8 years and 5 months after the 1979 judgment (R 113) to assert claims against relatives of Mr. Malouf and persons having mortgages against any possible interest in residential property he held or once owned, far in excess of any possible equity. On the merits, the court abused its discretion or lacked jurisdiction to join those Defendants because Plaintiffs failed to state a claim against them. (R 93-112, Addendum Item 9). Barbers consistently refused to ever credit the $20,000 they themselves bid December 3, 1986, for this very property.

The so-called Second Cause of Action (R 66-70) in the Amended Complaint attempts to invalidate an assignment of the beneficial interest in a second trust deed on the property from Logan Savings and Loan dated June 3, 1982, to a legitimate creditor. The assignment was of a second mortgage made two years before Barber's 1979 judgment, for valid consideration, and it was recorded. This was five years three months before the Amended Complaint was filed. Defendants alleged Barbers were time-barred by §78-12-22, §78-12-25 and §78-12-26 U.C.A., the eight year, four year, and three year statutes of limitations, respectively. (R 114-118). Barbers also attempted to attack the validity of a judgment against Mr.Malouf dated January 15, 1982, recorded about five years nine months before their Amended Complaint. Defendants asserted the same limitations defenses, and other defenses. For the arguments, see Defendants' Motion and Memorandum to Strike (R 93-102) and Reply in Support of Motion to Strike (R 106-112) dated August 24, 1987 and September 8, 1987. (Addendum Item 9).

Procedurally, Rule 14, U.R.C.P., was not fulfilled by the court or the Barbers in amending the Complaint. Barbers did not allege the additional parties were liable for the 1979 judgment. They cannot be liable for a renewal judgment. By the time the Amended Complaint was offered in July 1987 (R 73), the 1979 judgment had expired. (April 19, 1987, Addendum Item 1). Only Defendants to the March 27, 1987 Complaint could potentially be liable for a renewed judgment. The presence of additional parties is not necessary to resolve renewal of the 1979 judgment. Barber's claim against Malouf's interest in property was not relevant to the renewal effort. At most Barbers could attempt a completely separate action. The 1979 judgment lien on property ended at the expiration of the 1979 judgment. While Barbers might argue their bid at the execution sale gave them some right to argue for possession with others, they never credited their bid to the judgment. Barber's Complaint claims they bought something for $20,000. They gave no credit. Barbers should be deemed to have waived any claim against Malouf's property by their failure to credit the bid. They should be estopped from trying to litigate ownership or title to the property.

With respect to the very issues that the Second and Third Causes of Action seek to try, in the prior action, No. 17630, the same trial court held that the prior execution against Defendant Malouf had never been challenged, even though the Plaintiffs had notice in excess of three years. It also held that the prior execution had priority over any execution claims of the Plaintiffs against the same relatives and lien holders that Plaintiffs sought to add as Defendants in the Amended Complaint. The matter is thus res judicata, and the trial court should have upheld its prior rulings in granting Defendants Motion to Strike the Amended Complaint. The prior ruling by this court, and the arguments which support it, is contained in the Appeal Record, Case No. 17630, pages 355-6; 369-377; 379-381; particularly Findings of Fact 9 & 10, plus Conclusions of Law 7, 8, 9 & 10. The order was signed April 24, 1987, and should be considered res judicata as far as counts 2 & 3 of the Amended Complaint are concerned.

The addition of Defendants named in the Amended Complaint was illegal. They are inappropriate parties to Barber's renewal effort, and the trial court abused its discretion by allowing them into the suit. They should be dismissed, and the Barbers have no cause of action. The court abused its discretion by allowing the Amended Complaint to be filed September 16, 1987. (R 113). The court made no legal or factual findings to justify itself.

V.

THE MATERIAL ISSUES OF FACT PROHIBIT SUMMARY JUDGMENT

The review standard for an adverse summary judgment is whether there is any genuine issue as to any material fact, and if there is not, whether the moving party is entitled to judgment as a matter of law. This court should treat the Appellants' statements and evidentiary materials as if a jury would receive them as the only credible evidence, and the Supreme Court sustain the judgment only if no issues of fact, which could affect the outcome, can be discerned.

In Zions First National Bank v. Clark Chemical Corp., 762 P.2d 1090 (Utah 1988), summary judgment was reversed using the above-stated standard in an opinion written by Chief Justice Hall. He also wrote the majority opinion in Merrill v. Cache Valley Dairy Association, 750 P.2d 539 (Utah 1987), where another summary judgment by Judge Christoffersen was reversed. Even the dissenting opinion does not quarrel with the review standard.

The review standard for legal issues does not require this court to give any deference to the trial court's legal conclusions given to support the grant of a summary judgment. This court should review those legal conclusions for correctness. Atlas Corp. v. Clovis National Bank, 737 P.2d 225, 229 (Utah 1987).

When there are material issues of fact, is it proper for the trial court to ignore them and offer no analysis or explanation? Defendants think not. We are entitled to a response. The standard set forth in Bowen v. Riverton City, 656 P.2d 434 (Utah 1982) requires the court to evaluate all evidence, and reasonable inferences fairly drawn from the evidence, in the light most favorable to the party opposing the motion for summary judgment. The trial court did not do this.

There were at least fourteen disputed facts supported by at least two affidavits to the trial court which did not rationalize them away. (R 163-184; 203-207; Addendum Items 10 and 11. See also TR Oct. 3, 1988 pp.1-10). The issues of material fact before the trial court are numerous, (R 166-7; 204-7), and at least include these subjects:

1. The Complaint sought to change and improve the 1979 judgment, rather than just renew it. The trial court ruled that asking for interest on that judgment was not a modification of the judgment. (R 43). The court never

made an analysis of that 1979 judgment, or its pleadings, to justify its ruling. There is a genuine factual question of what the 1979 judgment allows.

2. Defendants were entitled to have a credit for the unconditional $20,000 bid made by the Plaintiffs on an execution sale. (R 213). The court had even required the Barbers to enter a credit for their bid before issuing subpoenas in the original action. April 24, 1987 the trial court entered a Finding in Case No. 17630, which stated:

> (9.) Plaintiffs have not filed Partial Satisfaction of Judgment required after the December 3, 1986 sheriff's sale, where $20,000 was paid by the Plaintiffs toward the judgment. (R 17630, p. 380).

The Conclusion of Law which followed that Finding was:

> (7.) Plaintiffs are required to first enter partial satisfaction of judgment from the sale of one Defendant's interest in property on December 3, 1986. (R 17630, p. 380).

That never happened. (R 213-214). The court renewed the 1979 judgment without doing that. There is a legal and factual question as to why the trial court's prior order was not complied with. Defendants are entitled to legal offsets for that bid. (R 211-214; 108-110) The argument was ignored because the trial court mistakenly believed changes to the 1979 judgment had been affirmed by the Supreme Court and all Barbers were doing was renewing the same judgment (TR 12, lines 2-5). A factual question exists about what the Appeals Court really did. The trial court was inattentive to believe either offset or interest issues had been settled in the appeal. (R 149-151). (TR 1-10, esp. p.2, lines 14-25; 3-4).

3. Defendants are entitled to an equitable offset for their equity after Barber's purchase of the Stocking property. The court made no statements justifying the rejection of Stocking's affidavits or the Defendants' argument. The amount claimed to be fair is between $11,808 and $26,808. (See Point III).

4. Payment made December 31, 1982 by the Plaintiffs in the amount of $866.47 was only credited by Barbers against interest. The Defendants argued it should be credited against principal. The face amount of the judgment only requires that Barbers receive $21,211.30.

5. The renewal Complaint sued for $41,751.43. The court ignored the factual issues about the reason the actual amount of the 1979 judgment is less. It did not explain its allowance of a higher amount in legal or factual terms. Yergensen v. Ford, supra, would not allow a renewal judgment to look again to the note. So how did the trial court amend the 1979 judgment? (R 30-31). The contract had been replaced by the judgment. The trial court never explained why the renewal judgment could add terms not part of the original judgment.

6. Without initially taking any evidence, the court awarded "sanctions" against the Defendants. Attorney's fees on the renewal judgment are disputed. When testimony was introduced on attorney's fees, Barber's attorney ultimately said "This case is on a contingency basis . . . We do not bill (Barbers) for our time. It is on a one-third contingency basis of anything we collect." TR 16, lines 20-23. The court abused its discretion by ordering Defendants' attorney to pay $3,000 in fees for sanctions. The court never made timely, true or adequate findings. (R 246-248). After repeated efforts by Defendants (R 6-9; 29-30; 222-3) Barbers finally admitted one item - that they were not entitled to a joint and several judgment (R 222-3; TR 6, lines 12-24). There is a factual issue of what acts justify sanctions.

7. The partnership's bankruptcy required lifting the bankruptcy stay before proceeding with an action or judgment. Why wasn't it lifted? How does the court get jurisdiction over the partnership? This question mixes law and fact. The fact remains that the stay was never lifted, the partnership was never a party. The trial court abused its discretion. It never attempted to find facts to support summary judgment against parties never served.

8. The Counterclaim (R 63) and Affidavits (R 15-17; 172-84) show Barbers fraudulently and/or intentionally breached promises made to the Stockings, by not allowing an equitable credit. Did they really buy solely as disinterested persons? How can the court find this (it didn't) when Barbers don't dispute they bought First Federal's beneficial interest? Regardless of their intent, they received Stocking's equity (including that of Mrs. Stocking), but made no reduction in the debt. What findings support this?

9. Defendants counterclaimed, in part, to seek damages

for a groundless lien against real property under U.C.A. Section 38-9-1. Whether the lien was justified is another question for trial. (R 119, paragraph 6; 127-8; 170; 206, paragraph 14).

10. Joint liability issues existed (R 225-228), but were resolved only after summary judgment was allowed.

The foregoing material issues of fact, or mixed questions of fact and law, arise from what became of the First Cause of Action in the Amended Complaint. The minute factual questions were spelled out for the court in the Record on pages 166-7 and 204-207. These are shown by the Answer, Counterclaim, and Affidavits opposing Summary Judgment. Questions of equitable credit to Mr. & Mrs. Stocking; whether Barbers are required to charge each general partner a share of the debt; whether Barber's encumbrance of real property is actionable, as U.C.A. §38-9-1 says it is, are <u>also</u> applicable to resolving the Third Party Complaint. These disputed factual issues between the parties are supported by the pleadings. (R 216-218). The court abused its discretion by granting partial summary judgment to "renew" the judgment and dismiss the Counterclaim and Third Party Complaint.

The Utah Supreme Court said in <u>Bennion v. Amass</u>, 22 U.2d 216, 500 P.2d 512 (1972) that summary judgment shall not enter if there are disputed issues to warrant a trial. In the Motion for Summary Judgment, Barbers failed to set forth a list of the facts which they claim were undisputed. Defendants listed the facts which existed that were disputed. (R 164-167; 203-207). The court never rationalized these away. Its decision should be reversed.

VI.

THERE WAS NEITHER A LEGAL NOR FACTUAL BASIS TO SUPPORT A SANCTION ORDER

This case presents the question of whether Rule 11 sanctions need to be supported by proper findings. The trail court gratuitously ignored the record and the pleadings, and imposed sanctions without sufficient reason or correct analysis. The court ordered attorney's fees in the sum of $3,000 in connection with its August 22, 1988 Memorandum Decision. (R 219-220). The proposed form of Findings and Judgment initially referred to this as a penalty. (R 228) Yet, there was no competent finding that Defendants violated Rule 11. Barbers filed no affidavit supporting the amount of attorneys fees reasonably expended. In fact, they had no attorneys fees (TR 16). Plaintiffs themselves suggested the question of attorney's fees be deferred and not ruled on in the Summary Judgment question. (R 137). The award does not satisfy U.C.A. §78-27-56 which requires only reasonable attorney's fees. Even assuming the other elements of that statute may have been somehow met in the mind of the judge, the court did not make any findings to support that amount, or any amount. Where is the court's analysis? If there was analysis, it should have been in the August 22, 1988 Memorandum Decision. The Decision lacks sufficient reasoning to justify what the court did. If the court was tired of hearing from Defendants, it should have pondered their arguments and recalled that nowhere had it intelligently resolved the issues. In the Defendants' objections to the form of the pleadings, those arguments are summarized again (R 229-232). The proposed orders came after the fact and cannot be used to justify the court. The original proposed findings were retained by Plaintiffs. (TR 38, lines 19-23).

Now the court has re-styled its contempt decision as a penalty. The final form of the judgment leaves in the word "contempt", and adds language attempting to justify the Memorandum Decision as if it were made under Rule 11. (R 247). The August 22, 1988 Memorandum Decision is clearly not talking about Rule 11 Sanctions. (R 219). Besides, Rule 11 only allows sanctions if "the pleading, motion or other papers are signed in violation of the Rule". The court made no findings that any pleadings or other papers violated the Rule.

The trial court found contempt too easily. This court in State v. Barlow, 102 Utah Adv. Rep. 28, at 29 (Feb. 10, 1989) stated:

> We agree that the trial court committed error in finding Appellant in contempt, because the procedural requirements of Utah Code Ann. §78-32-3 (1987) were not observed.

The trial court failed to justify its finding by making an order complying with U.C.A. §78-32-3:

> . . . reciting the facts as occurring . . . adjudging that the person proceeded against is thereby guilty of a contempt and that he be punished as prescribed in §78-32-10 hereof.

The trial court was reversed because :

> . . . no order appeared in the record reciting the facts forming the basis for the finding of contempt. . . . In addition, U.C.A. §78-32-10 (1987) limits the maximum find that may be imposed on a contempt judgment to $200. Id. at 29.

The court erred in believing all the issues had been settled. What about the other legal issues, including credit for the $20,000 bid; the Stocking equity; release of one partner by not seeking additional money after the trust deed sale; no service on the dissolved partnership; no service on one general partner in a joint judgment. It is true that the Plaintiffs agree the judgment should be joint rather than joint and several, in the end. None of these issues was before the Court of Appeals. None were decided by the first judgment in 1979. All were brought before the trial court. On only the joint v. joint and several liability issue did the trial court and the Plaintiffs concede. All the other issues, the trial court said, had been resolved. That's just not true.

Even if sanctions are allowable, only reasonable attorney fees can be allowed. Even then this could only be proper under actual Rule 11 violations. It would not be proper for a contempt punishment. Either way, there are no facts to make the court's findings or award reasonable or true. The trial court may have believed, as it states in its Memorandum Decision (R 219), that it had made repeated findings in the past on the issues. If that is true, the Plaintiff and the court ought to be able to specifically refer to some analysis. (R 229-232). Plaintiffs and the court failed to show how or where the 1979 judgment was ever amended. The writs on the 1979 judgment have expired. They did not change what the judgment says. The trial court never explained why the court's April 24, 1987 ruling, (in Case No.17630, R 17630 pp. 379-38), which required the Plaintiffs to enter a Partial Satisfaction for their bid of $20,000, was not applicable before any new judgment is entered. (R 213-214).

Appellants would like to marshall all the trial court's evidence that supports what the trial court did, so the Supreme Court could review it. However, the trial court never made any analysis. It only made a statement that it had been made. (R 219). The truth is either that the trial court accepted statements by the Plaintiffs about the court's prior conclusions which were not true, or it misapprehended what was in the Record.

No specific violation of Rule 11 is referred to by the court. There was no evidence of attorneys fee expenses actually incurred by Barbers. Where there is insufficient evidence of the reasonableness of attorney's fees, the award must be vacated. Associated Industrial Development, Inc. v. Jewkes, 701 P.2d 486 (Utah 1984).

If the court is to make a finding of contempt, it must follow the procedures in U.C.A. §78-32-3 et seq. and support the claim with an affidavit. Under §78-32-10, U.C.A., Defendants are allowed a hearing on the issues, and §78-32-11 requires the hearing determine actual loss or injury. Contempt must be supported by a recitation of facts or an affidavit. Penalties for contempt do not include unsupported, or any, attorney's fees in facts like these. An actual loss or injury must first be determined to be caused by contempt before awarding contempt damages. These standards were simply not met. There is no provision for an additional penalty of attorney's fees for contempt. See Mellor v. Cook, 597 P.2d 882

(Utah 1979), and U.C.A. §78-32-10.

CONCLUSION

None of the issues argued here were resolved by the Appeals Court Decision February 12, 1988. (Case No. 870128-CA, 750 P.2d 202 (Utah 1988). We should hardly expect they would have been. However, the trial court thought everything had been to this court already. (TR pp. 1-3). The Appeals Court limited itself solely to the question of the timeliness of an appeal of a writ in the 1979 judgment. It did not address the merits of the questions raised herein, but limited itself solely to the timeliness question of appeals on a writ of execution. It did not review the 1979 judgment to see whether post-judgment interest is allowed.

The factual issues before the trial court are genuine. (R 166-7; 204-207). Defendants are entitled to be heard by some court that will really listen. The legal issues before the trial court demand that parts of this matter be dismissed, and that there be a trial on the rest. The trial court never answered the questions of, "what is the real amount the 1979 judgment; whether it had been paid; whether there were equitable offsets available; and, whether the Plaintiffs had to honor the bid they had made and the court had previously told them to honor. After that, it never got to the question of the amount, if any, that could be renewed. All of these questions were before the trial court, as well as legal questions about the jurisdiction of the court and its ability to enter a judgment at all. If one was to be entered, McCune requires the partnership assets pay first. The Counterclaim contained Defendants' claim against the Barbers for overreaching, misrepresentation, and even fraud in seeking to enforce the judgment. The court did not justify throwing these out.

All of those questions were before the trial court, and exist before this court now. The court abused its discretion when it decided to enter judgment against the partnership and general partners, where the partnership itself was in bankruptcy and had assets and a trustee, but the partnership and one partner were not served.

Alternatively, judgment could not be renewed against joint obligors where one obligor was released after negotiations with Barber's attorney and Barbers failed to seek a deficiency judgment; and another obligor was released because he was not served.

Failure to amend the prior judgment and statutes of limitation problems are valid defenses to efforts to expand the judgment beyond its 1979 terms. Even if these issues did not all exist, Barbers admit their sole claim to post-judgment interest is grounded on U.C.A. §15-1-4. That section should not help them because the prayer in the Complaint did not ask for post-judgment interest. Even if it had, the judgment was based on a contract and Section 15-1-4 was not complied with.

The damage done to the Defendants would have been far less if the trial court had only renewed the 1979 judgment's exact language. The trial court did not limit itself to that. It should not even have gone that far, however, because the partnership had assets and Plaintiffs elected to only go after two general partners, ignoring the other two joint obligors. Now that it is past time for their trial, the judgment should be dismissed. Defendants seek attorney fees on appeal and ask that summary judgment against them be vacated, based on the facts and law presented here.

Dated this 10th day of March, 1989.

Raymond N. Malouf
Attorney for Defendants and
Third Party Plaintiffs/Appellants

CERTIFICATE OF MAILING

I hereby certify that on the 10th day of March, 1989, four true and correct copies of the foregoing Brief of Appellants Case No. 880410, were mailed postage prepaid to the following:

N. George Daines, Esq.
Attorney for Plaintiffs, Third Party and
Counterclaim Defendants/Appellees
108 North Main, Suite 201
Logan, Utah 84321

Raymond N. Malouf

ADDENDUM

Item

1. Original January 1979 Complaint from Cache County No. 17630. (R 17630, pp. 1-4).
2. Original April 18, 1979 Judgment. (R 17630, pp. 40-41).
3. Complaint to renew judgment, March 27, 1987. (R 25616, pp. 1-3).
4. Motion to Dismiss Complaint, and Stocking Affidavit. (R 4-17; 27-38).
5. Memorandum Decision, Objections and Order. (R 43-49).
6. Answer and Counterclaim by Stocking and Malouf. (R 62-65).
7. Rule 54(b) Order, December 27, 1988.
8. Notice of Appeal. (R 260-261).
9. Motion to Strike Amended Complaint. (R 93-102; 106-112).
10. Defendants' Response to Memorandum, opposing partial summary judgment, and Affidavits of Stocking and Malouf. (R 163-184).
11. Defendants' response to Supplemental Memorandum, opposing partial summary judgment. (R 203-218).
12. Notice of Objections to proposed findings. (R 221-241). case, but it misapprehended the true facts and incorrectly recalled the pleadings.

Tab 1

14

B.H. HARRIS
HARRIS, PRESTON & GUTKE
Attorney for Plaintiffs
31 Federal Avenue
Logan, UT 84321
Telephone: 752-3551

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY,
STATE OF UTAH
----ooo0ooo----

NORMAN BARBER and HELEN BARBER,)
husband and wife,)
)
Plaintiffs,)
)
vs.)
)
THE EMPORIUM PARTNERSHIP, and)
VON K. STOCKING, DON A. WHITE,)
JR., and RAYMOND N. MALOUF, JR.,)
general partners,)
)
Defendants.)

COMPLAINT

Civil No.________

Comes now the Plaintiffs and complain of the Defendants and for cause of action alleges:

1. That the Defendant, Emporium Partnership, is a limited partnership under the Limited Partnership Act of Utah and the named Defendants are the general partners of said partnership. Said partnership is located in Cache County, Utah.

2. That on or about the 11th of November, 1977, Plaintiffs loaned to the Defendants the sum of Fifteen Thousand ($15,000.00) Dollars. Defendants executed the attached note marked Exhibit "A" payable to Plaintiffs, and delivered the same to Plaintiffs.

3. That the Plaintiffs have made repeated demands upon the Defendants for payment of said note and interest and the Defendants have refused to pay any part or portion thereof. That the full amount of the said note of Fifteen Thousand ($15,000.00) Dollars is due plus interest to date hereof in the amount of Twenty-one Hundred Eighty and 88/100 ($2,180.88) Dollars.

Number 17630

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169

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HARRIS PRESTON & GUTKE
ATTORNEYS-AT-LAW
31 FEDERAL AVENUE
LOGAN UTAH 84321

PHONE 752 3551

4. That the said note provides for the payment of reasonable attorney's fees in the event of collection and suit and that the Plaintiffs allege that the sum of Four Thousand ($4,000.00) Dollars is reasonable attorney's fees to be awarded the Plaintiffs for use and benefit of their attorney in bringing this action.

Wherefore, Plaintiffs pray judgment against the Defendants for the principal sum of Fifteen Thousand ($15,000.00) Dollars, interest thereon of Twenty-one Hundred Eighty and 88/100 ($2,180.88) to date hereof plus interest additional at the rate of twelve (12) percent per annum until judgment plus court costs herein expended and reasonable attorney's fees as may be awarded by the Court.

NORMAN BARBER

HELEN BARBER

B.H. HARRIS
HARRIS, PRESTON & GUTKE
Attorney for the Plaintiffs
31 Federal Avenue
Logan, UT 84321

STATE OF UTAH)
) ss.
County of Cache)

NORMAN BARBER AND HELEN BARBER, first duly sworn deposes and say: That they have read the above and foregoing complaint and know the contents thereof and that the information contained therein is true except any matters that are stated on information and belief and as those matters, they believe them to be true.

NORMAN BARBER

HELEN BARBER

Subscribed and sworn to before me this ______ day of January, 1979.

Notary Public
Commission Expires: 10/29/82
Residing at Logan, Utah

245-6908

Oc 11 - 1977

EXHIBIT "A"

[illegible] to pay to the order of Norman and Helen Barber

in Hyrum Utah, or at such other place as the holder hereof may designate

e sum of *Fifteen Thousand Dollars* Dollars ($15,000.00), payable as follows:

Lump sum May 11, 1978

h before and after judgment, with interest on the unpaid balance thereof from date until paid at the rate of twelve per cent (12 %)
nterest payable as follows:

11th of each month

nent of this note with interest to date of payment may be made at any time without penalty.

older deems itself insecure or if default be made in payment of the whole or any part of any installment at the time when or the place
me becomes due and payable as aforesaid, then the entire unpaid balance, with interest as aforesaid, shall, at the election of the holder
without notice of said election at once become due and payable. In event of any such default or acceleration, the undersigned, jointly and
ree to pay to the holder hereof reasonable attorney's fees, legal expenses and lawful collection costs in addition to all other sums due

nent, demand, protest, notice of dishonor and extension of time without notice are hereby waived and the undersigned consent to the
y security, or any part thereof, with or without substitution.

N. Main Emporium Partnership

x Don K. Stocking

x Don A. Whit

Tab 2

B. H. HARRIS
HARRIS, PRESTON & GUTKE
Attorney for Plaintiffs
31 Federal Avenue
Logan, UT 84321
Telephone: 752-3551

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY,
STATE OF UTAH

----oooOooo----

NORMAN BARBER and HELEN BARBER, husband and wife,

Plaintiffs,

vs.

THE EMPORIUM PARTNERSHIP, and VON K. STOCKING, DON A. WHITE, JR., and RAYMOND N. MALOUF, JR., general partners,

Defendants.

JUDGEMENT

Civil No. 17630

----oooOooo----

THIS MATTER came on regularly for hearing before the Court without a jury on the Plaintiff's Motion for Judgement on the Pleadings. The affidavits and memorandum having been submitted to the Court by the parties and the Court having entered its Memorandum Decision on the 11th day of April, 1979, and based thereon, the Court having made and filed herein its Findings of Facts and Conclusions of Law and based thereon;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiffs have recovered judgement against the Defendants in the amount due on a promissory note in the amount of Fifteen Thousand ($15,000.00) Dollars plus accrued interest at the rate of 12 percent per annum from date hereof until paid in the amount of Twenty-one Hundred Eighty ($2,180.00) Dollars, attorney fees in the amount of Four Thousand ($4,000.00) Dollars and court costs in the amount of Thirty-one and 30/100 ($31.30) Dollars.

Number 17630-17

FILED APR 1 197

Clerk

Book 11 At 10:

DATED this 17 day of April, 1979.

DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Judgement to Raymond N. Malouf of MALOUF & MALOUF, Attorney for Defendants, 21 West Center, Logan, Utah 84321, this ______ day of April, 1979.

Tab 3

RECEIVED
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CACHE [illegible] CLERK

N. George Daines - 0803
DAINES & KANE
108 North Main, Suite 200
Logan, UT 84321
Telephone: (801) 753-4403

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

NORMAN BARBER and HELEN
BARBER, husband and wife,

Plaintiff,

vs.

THE EMPORIUM PARTNERSHIP,
and VON K. STOCKING,,
DON A. WHITE, JR., and
RAYMOND N. MALOUF, JR.,
general partners,

Defendants.

COMPLAINT TO RENEW JUDGMENT

Civil No.

COME NOW the Plaintiffs and complain of the Defendants as follows:

1. That Plaintiffs are residents of Cache County, Utah.

2. That this court granted judgment against the Defendants in this jurisdiction on April 18, 1979, Civil No. 17630.

3. That Defendants have failed to fully pay and satisfy said judgment.

4. That Defendants have made one payment in the amount of $866.47 on December 31, 1984 toward the interest on said judgment.

4. That there are sums due and owing to Plaintiff on said judgment as follows:

Number ~~[illegible]~~ 1

MAR 27 1987 38
SETH S. ALLEN, Clerk
By ________ Deputy

$15,000.00	Principal,
$ 2,180.00	Accrued interest to date of judgment, from November 11, 1977, at the rate of 12% per annum,
$ 31.30	Accrued costs to date of judgment,
$ 4,000.00	Attorneys fees,
$ 330.70	Costs accrued in enforcing judgment,
$ 20,209.43	Interest from date of judgment to March 25, 1987,
$ 41,751.43	Total Amount Due

plus interest thereon at 12% from the 25th day of March, 1987, until collected.

5. That said judgment is due to expire due to the statute of limitations on judgments.

6. That a new judgment should be granted as prayed for in this complaint to replace and/or renew the judgment due to expire.

7. That due to Defendants non-payment of the amount due, Plaintiffs have incurred further attorneys fees in the bringing of this action and should be awarded reasonable attorneys fees to be determined by the court in addition to the amounts previously complained of.

WHEREFORE, Plaintiff prays judgment against the Defendant as follows:

A. To renew previous judgment entered in the amounts set forth below:

$15,000.00	Principal,

$ 2,180.00	Accrued interest to date of judgment, from November 11, 1977, at the rate of 12% per annum,
$ 31.30	Accrued costs to date of judgment,
$ 4,000.00	Attorneys fees,
$ 330.70	Costs accrued in enforcing judgment,
$ 20,209.43	Interest from date of judgment to March 25, 1987,
$ 41,751.43	Total Amount Due

2. For reasonable attorneys fees to be determined by the court incurred in the filing and prosecution of this action.

3. For costs and such other and further relief as the court deems equitable.

DATED this 27th day of March, 1987.

DAINES & KANE

N. George Daines
Attorney for Plaintiffs

Tab 4

2:15 P.M.

Raymond N. Malouf/dh (68:EMBAMTD.RDP)
MALOUF LAW OFFICES
Attorney for Defendants
150 East 200 North #D
Logan, UT 84321
Telephone: 752-9380

DISTRICT COURT, STATE OF UTAH, COUNTY OF CACHE

NORMAN BARBER and HELEN BARBER, husband and wife, Plaintiff, vs.	MOTION TO DISMISS AND TO STRIKE
THE EMPORIUM PARTNERSHIP, and VON K. STOCKING, DON A WHITE, JR., and RAYMOND N. MALOUF, JR., Defendants	Civil No. 25616

Comes now Defendant Raymond N. Malouf, Jr. and moves to dismiss the Complaint because the Court lacks jurisdiction to grant the relief requested for the following reasons:(1) the Court lacks jurisdiction over the person of the Defendant Partnership;(2) the Court lacks jurisdiction over the subject matter;(3) the Complaint fails to state a legal claim for relief; and (4) the Complaint fails to join an indispensible party.

Defendant further moves to strike certain of the items in the second paragraph (4) and paragraphs 6 and 7 in the Complaint for alleging immaterial, impertinent, scandalous and fraudulent matters.

This Motion is based upon the Complaint filed herein and this Motion together with Defendant's Memorandum and affidavit in support thereof.

DATED this 20 day of April, 1987.

Number 25616-2

APR 20 1987
SETH S. ALLEN, Clerk
Deputy

Raymond N. Malouf

Raymond N. Malouf/dh (68:EMBAMMTD.RDP)
MALOUF LAW OFFICES
Attorney for Defendants
150 East 200 North #D
Logan, UT 84321
Telephone: 752-9380

DISTRICT COURT, STATE OF UTAH, COUNTY OF CACHE

NORMAN BARBER and
HELEN BARBER, husband
and wife,
Plaintiff,

vs.

THE EMPORIUM PARTNERSHIP, and **VON K. STOCKING, DON A. WHITE, JR.**, and **RAYMOND N. MALOUF JR.**,
Defendants.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND TO STRIKE

Civil No. 25616

Defendant Raymond N. Malouf, Jr. has filed a Motion to Dismiss the Complaint based on the fact that this Court lacks jurisdiction to grant the relief requested because the Court: (1) lacks jurisdiction over the person of the Defendant Partnership; (2) the Court lacks jurisdiction over the subject matter of the suit; (3) the Complaint fails to state a legal claim for relief; and (4) the Complaint fails to join an indispensible party.

In addition, Defendant has moved that certain of the claims in the second paragraph (4) and in paragraphs 6 and 7 in the Complaint be stricken for alleging immaterial, impertinent, scandalous and fraudulent matters.

FACTS

The only undisputed fact is that a judgment was rendered in Civil No. 17630 on April 18, 1979. Almost every other allegation

Number 25616-3

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SETH S ALLEN Clerk

in the Complaint will be contested if a response is required. For purposes of this Motion, it is sufficient to say that the present Complaint most definitely is not a legal effort to renew the prior judgment, but instead is an attempt to obtain an entirely different judgment, and is beyond the scope of the prior judgment. Thus, this motion. Relevant facts for each point will be referred to hereafter.

ARGUMENT

I

THE COURT LACKS JURISDICTION OVER THE PERSON OF THE PARTNERSHIP, AND THE COMPLAINT FAILS TO JOIN AN INDISPENSABLE PARTY

Plaintiff attempted to serve the Defendant Emporium Partnership by serving one of the partners, to wit: the undersigned. The Partnership no longer continues to operate its normal business and jurisdiction over the partnership cannot be obtained by serving the undersigned for the following reasons:

1. The Defendant Partnership is in bankruptcy, No. 79-01412, converted to Chapter 7 bankruptcy May 22, 1982 in the District of Utah.

2. The trustee of the Emporium Partnership is James Z. Davis, attorney at law, 1020 First Security Bank Bldg, 2404 Washington Blvd., Ogden, Utah 84401.

3. The fact of bankruptcy of the Defendant Partnership is sufficient to cause the dissolution of the partnership, and the Partnership has either ceased or is in a stage of dissolution.

4. The bankruptcy of the partnership is sufficient to give rise to the protection and requirements of 11 USC §362, which is an automatic stay against any continuance or furtherance or initiation of any action against the partnership, including this action.

5. Plaintiffs have not obtained relief from the automatic

stay, which they must do, before proceeding against the Partnership or any of its assets.

6. The trustee in bankruptcy has not been named as a party in this action, so process is insufficient. Since the trustee is not named, he obviously has not been served, so there is no jurisdiction over the Partnership in any event.

Inasmuch as Plaintiff has failed to even allege a cause of action that would result in jurisdiction over the Partnership, the Complaint should be dismissed.

II
THE COURT LACKS JURISDICTION OVER THE SUBJECT MATTER OF THE SUIT, AND CERTAIN ELEMENTS OF THE COMPLAINT SHOULD BE STRICKEN

The original action was for suit on a note signed by Von Stocking and Don White. The statute of limitations on that note expired, according to Section 78-12-23 U.C.A., 6 years after the note, more than 2 years ago. Plaintiff seeks to renew its judgment barely before the expiration of the 8 year statute of limitation provided in §78-12-22. Such an effort is strictly limited to the judgment itself. In the renewal action, the prior note has become merged wtih the judgment and ceases to exist. The present action, then, is no longer an action founded on contract. See Yergensen v. Ford, 16 U.2d 397, 402 P2d 696 (1965) and Gossner v. Dairymen Assoc. 611 P2d 713 (Utah, 1980). The judgment, as entered, limits the relief the Plaintiff can seek to renew in this action to the award actually made and enforceable in the prior action. The relief Plaintiff is seeking in this action is in excess of what was allowed by the prior judgment. The Court lacks jurisdiction to grant any relief in excess of what the prior judgment actually allows.

The prior judgment does not allow interest, except for $2,180 from the date of the judgment until that judgment is paid.

That language limits the amount of interest that can be collected or sued on in this action. The language in the prior judgment is not a mere failure to record the judgment as entered, inasmuch as it is consistent with the findings of fact, conclusions of law and even the prayer in the prior Complaint. The pleadings were all prepared by the Plaintiff. They do not amount to a mere error to be reformed. To get any more, the judgment would have to be worded differently than it is. The standard for changing words in a judgment is set forth in Richards v. Siddoway, 24 U.2d 314, 471 P2d 143 (1970). The only way to change the amount of money allowed by a judgment is for the judgment to be amended. The error in the prior judgment is at most a judicial error in rendering the judgment. Judicial errors can only be cured by a timely motion for a new trial, amended findings, appeal or a new action.

The prior judgment is clear in limiting the interest to the amount specified from the "date hereof until paid." The Court does not have the power to modify the judgment, even to make technical changes, since the time for appeal expired and that item was not appealed. See Benson v. Anderson, 14 U. 334, 47 P 142 (1896) and Frost et. al. v. District Court, et. al., 96 U. 106, 83 P2d 737 (1938):

> "... After the time for appeal has expired, the Court has no power to modify a judgment in a substantial or material respect. This is well-settled law."

Allowance of the present suit would of course amount to an amendment of the judgment, which is not allowed. The present suit, seeking more than the prior suit, should be dismissed.

In other parts of the second paragraph numbered (4) of the Complaint, Plaintiff seeks another item clearly not included in the prior award: $330.70 in costs incurred in enforcing the prior judgment. Those costs were not allowed by the prior judgment, and the prior judgment has expired. It also illegally seeks interest after March 25, 1987, which is an additional attempt to expand the prior judgment. Since the prior judgment already specified the dollar amount of interest that could be collected, and since Plaintiff alleges the prior judgment is unpaid, the new action cannot seek to expand the prior judgment for more money.

Paragraph (6) asks a new judgment not according to the prior judgment, but as Plaintiff has reworded it. This clause cannot stand. Finally, paragraph (7) in this new action seeks for attorneys fees in bringing this complaint. That is not allowed by the prior judgment anywhere. The underlying note has long since expired, and there is no currently enforceable note or other agreement for attorneys fees, so there is no basis to seek additional attorneys fees. Accordingly, paragraph 7 must also be stricken.

III

THE COMPLAINT FAILS TO STATE A LEGAL CLAIM FOR RELIEF

Plaintiffs' claim is limited to the relief actually allowed by the prior judgment. Its claim for relief is far in excess of the limits of the prior judgment. Inasmuch as this new complaint seeks funds not allowed by the underlying judgment, it must be dismissed for failure to state a legal claim.

In addition to failing to state a legal claim for matters beyond the prior judgment, the prior judgment has been paid, with the possible exception of $344.83, and, it should be dismissed on the merits. The Complaint alleges in the first paragraph numbered (4) that the (only) payment was $866.47 made December 31, 1984. In fact, on December 3, 1986 Plaintiffs appeared and actually bid the amount of $20,000 plus costs for the right and interest of the undersigned in certain real property, which Plaintiffs caused to be advertised in advance of sale. This Court refused to quash that execution when the undersigned showed he had no interest. The sale took place. That proceeding was in connection with Civil No. 17630. Plaintiffs have so far wholly refused to enter a partial Satisfaction of Judgment for that additional amount, and must before bringing this present action.

The $20,000 paid by the undersigned, plus $866.47, which is shown at page 254 in the Record of Civil No. 17630 to have actually been credited December 31, 1982, makes a total of $20,866.47, plus all the costs of the Sheriff's sale, which should show as a satisfaction of the judgment against the undersigned.

The point being made here is that there can be no legal claim for relief when the judgment itself has been paid. If there is still any question as to whether the undersigned has paid all that is required of him on the judgment, reference to page 256 of Civil No. 17630 shows a letter from counsel for Plaintiff in this same action, dated October 3, 1986, 2 months before the execution sale wherein it is plain that the Plaintiffs claimed only one-third of the amount they claim due on the judgment from this Defendant. They specified that amount to be about $12,500. Thus, the Plaintiffs have been overpaid from this Defendant. Payments of $20,866.47 less $12,500 is $8,366.47 (plus costs) beyond the $12,500 the Plaintiffs wanted from him.

Attached hereto in support of this Motion is a copy of the certificate of sale evidencing the payment of $20,000 which has not been satisfied on the prior judgment.

The total original judgment was $21,211.30, as can be seen from page 40 of the record in Civil No. 17630. That is only $344.83 more than what this Defendant alone has paid on the judgment. The most, therefore, that Plaintiffs could seek for a legal cause of action would be $344.83. Far more than that amount was collected from Defendant Von Stocking, or Plaintiffs waived the right to collect anymore from Mr. Stocking when, after November 4, 1983 they failed within 90 days to seek a deficiency judgment after a trustee's sale of property in which the Plaintiffs were beneficiary of a trust deed which secured any and all indebtedness of any kind whatsoever from Mr. Stocking to the Plaintiffs.

August 29, 1983 by letter written from the attorney for Plaintiffs, within nine weeks before the trust deed sale, counsel for Plaintiffs agreed that the Von Stocking property was worth between $45,000 and $60,000. The letter also attests to the fact that at least some of the equity of Von Stocking should go to offset the judgment in favor of the Plaintiffs herein. A copy of the letter, together with an affidavit of Von Stocking is attached. The equity by Plaintiffs' own admission in the letter, is between $11,808.06 and $26,808.06.

Mr. Stocking's affidavit states the Plaintiffs went forward with the purchase of the trust deed sale and purchase of the beneficial interest in it to secure Plaintiffs' position in the prior judgment.

Because the entire underlying debt has been paid, it would appear that Plaintiffs have failed to state a legal claim for which relief can be granted and the entire Complaint should be stricken on the merits as impertinent and fraudulent.

CONCLUSION

For the reasons specified, the Court lacks jurisdiction to proceed on this case and must dismiss the action for lack of jurisdiction over the partnership as well as lack of jurisdiction over the subject matter. Plaintiffs have failed to include an indispensable party and have failed to obtain relief from the automatic stay in bankruptcy, without which they cannot pursue any of their allegations herein. The Complaint should be dismissed until relief from the stay has been obtained. Further, the Complaint actually fails to state a legal claim for which relief can be granted. It claims far and beyond what the underlying judgment permits. The underlying judgment has not been amended and cannot be amended now. Moreover, it appears as if the underlying judgment has more than been paid. Therefore, there is no cause of action to proceed on.

The matters in the Complaint are in excess of the underlying claim and are clearly immaterial, impertinent, scandalous and fraudulent in view of the pleadings and affidavits. Moreover, since the judgment has been paid, the entire Complaint should be stricken as being impertinent.

DATED this 20th day of April, 1987.

Raymond N Malouf

Raymond N. Malouf

CERTIFICATE OF MAILING

I hereby certify that on the 20th day of April, 1987, a true and correct copy of the foregoing Memorandum in Support of Motion to Dismiss and Motion to Dismiss was mailed postage prepaid to the following:

N. George Daines, Esq.
DAINES & KANE
Attorneys at Law
108 North Main
Logan, Utah 84321

M Luis DeFrancesco

Secretary

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

NORMAN BARBER and HELEN BARBER
husband and wife
Plaintiff
vs.
THE EMPORIUM PARTNERSHIP, and
VON K. STOCKING, DON A. WHITE., JR.
and RAYMOND H. MALOUF, JR.
Defendant

Certificate of Sale of Real Estate Under Foreclosure

Civil No. 17630

STATE OF UTAH,
County of Cache } ss.

I, Sidney P. Groll Sheriff of Cache County, State of Utah, do hereby certify that under and by virtue of the final judgment and decree of the said First Judicial District Court, heretofore duly made, rendered and entered in the above entitled cause, and of an order of sale duly issued therein and to me duly directed and delivered as Sheriff of said Cache County, whereby I was commanded to sell the property hereinafter described, or so much thereof as might be necessary according to law, and to apply the proceeds of such sale towards the satisfaction of the judgment in said action, amounting to the sum of $20,000.00 Twenty Thousand and no/100 ------- DOLLARS, with interest, counsel fees, taxes, and costs of suit, amounting in all to the sum of included DOLLARS, on the 3rd day of December A. D. 1986, after due and legal notice, I sold at Public Auction, according to the statute in such cases made and provided, to Norman and Helen Barber who was the highest and best bidder therefor, for the sum of $20,000.00 $20,000.00 DOLLARS, which was the highest and best sum bid, and which was the whole price paid by Norman and Helen Barber all the right, title and interest of the said defendant, in and to the real estate described in said order of sale, described as follows, to-wit:

Lot 30, GREENBRIAR ACRES SUBDIVISION, in the
Southeast Quarter of Section 23, Township 12 North,
Range 1 East, Salt Lake Base and Meridian.

496852
6.00

STATE OF UTAH
(SS)
COUNTY OF CACHE
FILED & RECORDED FOR
Cache County Sheriff
Dec 16 10 03 AM '86
MICHAEL [illegible]LEED
COUNTY RECORDER
BY DEPUTY /E

BOOK 392 PAGE 552

And I further certify that the said property was sold in One lots or parcels, as follows:

Lot 30, GREENBRIAR ACRES SUBDIVISION, in the Southeast
Quarter of Section 23, Township 12 North, Range 1 East,
Salt Lake Base and Meridian.

and that the same is subject to redemption in lawful money of the United States pursuant to the statute in such cases made and provided. Dated at Logan, Utah this 3rd day of December A. D. 1986.

Sidney P. Groll

By Richard Meacham
Deputy Sheriff

No. ______

Certificate of Sale

Sidney P. Groll
SHERIFF OF CACHE COUNTY
STATE OF UTAH
to
Norman and Helen Barber

STATE OF UTAH,
County of Cache } ss.

Filed for record and recorded ______ 19__
at ______ o'clock ___ M. in book ______ page ______
of ______
______ County Recorder
By ______ Deputy Recorder

BOOK 392 PAGE 553

LAW OFFICES
DAINES & KANE
128 NORTH MAIN
LOGAN UTAH 84321
(801) 753-4403

N GEORGE DAINES
KEVIN E KANE

29 August 198

AUG 1983
MALOUF,
MALOUF
LAW OFFICE

Mr. Raymond Malouf
150 East 200 North #D
Logan, Utah 84321

Re: Barber v. Emporium

60,000
33,191.94 Paid
26,808.06
↓
11,808.06
No credit [illegible]

Dear Ray:

Norm Barber and I have examined the Von Stocking home and believe that its worth would probably be somewhere in the range of $45-60,000.00. We believe to determine its value accurately, a professional appraisal should be done. In discussing various appraisers, Norm Barber and I felt that the best appraiser would probably be Tom Singleton, but perhaps, if you have someone else in mind, we would accept an appraisal upon advance clearance of the individual involved.

It would be my suggestion that you prepare that appraisal at your expense and submit it to us for our review. Upon reviewing that we may well be able to consummate some kind of an arrangement regarding your liability to Norm Barber.

Anticipating that this is going to take several weeks to determine what the appraisal of that home is and the likelihood that the home is insufficient to pay the full amount of the judgment, I think it is advisable that we continue with the Supplemental Order that was started this week. Please consider this formal notice, pursuant to our arrangement, that you should be prepared and at court the next motion and order day to continue answering questions regarding this supplemental proceedings. You should also be advised that we have served a notice to appear on your wife, your father and also Carl Malouf, to determine more concerning the arrangements between yourself and these individuals. I also anticipate preparation and perhaps filing of a lawsuit involving fraudulent conveyance against some of these parties. I fees strongly that you should come forward now and make some

definitive arrangements to take care of your obligation in this situation. Mr. Barber is insistent that you do so.

Sincerely,

DAINES & KANE

N. George Daines
Attorney at Law

le
cc Norm Barber

Raymond N. Malouf/dh (68:EMBAAFV.RDP)
MALOUF LAW OFFICES
Attorney for Defendants
150 East 200 North #D
Logan, UT 84321
Telephone: 752-9380

DISTRICT COURT, STATE OF UTAH, COUNTY OF CACHE

NORMAN BARBER and HELEN BARBER,
husband and wife,
Plaintiff,

AFFIDAVIT OF VON STOCKING

vs.

THE EMPORIUM PARTNERSHIP,
and VON K. STOCKING, DON A. WHITE,
JR., and RAYMOND N. MALOUF, JR.,
Defendants.

Civil No. 25616

STATE OF UTAH)
) ss
COUNTY OF CACHE)

Comes now Von K. Stocking and being first duly sworn deposes and states the following of his own personal knowledge:

1. That he is a Defendant in the above named action.

2. That he was a Defendant in Civil No. 17630.

3. That he owned the property described in book 189 page 458 in a Trust Deed given to First Federal Savings & Loan on March 18, 1976.

4. That the afore-described property was a home with a basement apartment worth far in excess of $33,191.94 that Plaintiffs Norman and Helen Barber paid First Federal for in their purchase of the beneficial rights on or about November 3, 1983.

5. That he knows Norman and Helen Barber bid $33,191.94 at the trust deed sale on this property on November 4, 1983.

Number
25616-4
APR 2 1987
TH S. ALLEN, Clerk

6. That he is familiar with the representations from Plaintiffs made by letter dated August 29, 1983 where Barbers alleged that the property was worth between $45,000 and $60,000, and knows that, for the date of the sale, such values were conservative.

7. On November 2nd and 3rd, 1983 he was involved in several conversations initiated by George Daines, attorney for Plaintiffs who asked him to agree to let the Barbers take over this property aforementioned by paying First Federal, <u>and</u> applying between $12,000 and $15,000 against the prior judgment to his credit, plus giving Von Stocking an additional $3,000.

8. That Mr. Daines continued these conversations while the undersigned was trying to cure the default with First Federal and until the morning of the trust deed sale on November 4, 1983.

9. That there was no doubt that the Barbers wanted to take over this property in order to collect from me on the judgment they had against the Emporium, the undersigned, Don and Ray.

10. That he relied on the representations by Mr. Daines on behalf of Plaintiffs that he would credit the prior judgment, and believed he had kept his word, which the undersigned has very good notes on, because Plaintiffs took no further action to collect from the undersigned until the prior judgment almost expired.

11. That Mr. Daines represented that he wanted each of the individual Defendants in the prior judgment to pay only the percentage of the prior judgment equal to their percentage of the Emporium Partnership.

12. That if Mr. Daines did not intend to go through with what he promised on behalf of his clients, the Plaintiffs should be required to honor his promises since Plaintiffs in fact proceeded to take over the property, and the undersigned relied on these representations by their attorney. In fact, Mr. Daines was fraudulent in his representations, but this fraud, of not crediting the prior Barber judgment, did not become apparent until

February 7, 1987 when Mr. Daines again served Mr. Stocking's wife with a Motion and Order for Mr. Stocking to appear in Supplemental proceedings on the prior judgment.

DATED this 13th day of April, 1987.

Von K Stocking
Von K. Stocking

Von K. Stocking having been duly sworn on oath deposes and states that he is the affiant and that he has read the foregoing Affidavit, knows the contents thereof and believes the same to be true and as to items stated on information and belief, the same are believed to be true.

Von K Stocking
Von K. Stocking

SUBSCRIBED and SWORN to before me this 13th day of April, 1987.

Christine Goff
NOTARY PUBLIC

Commission Expires: 9-24-88

Residing at:

SLC, Utah

CERTIFICATE OF MAILING

I hereby certify that on the 20th day of April, 1987, a true and correct copy of the foregoing Affidavit of Von Stocking was mailed postage prepaid to the following:

N. George Daines, Esq.
108 North Main
Logan, UT 84321

M Luis DeFrancesco
Secretary

RECEIVED
1987 MAY -8 PM 4:55
CACHE COUNTY CLERK

Raymond N. Malouf/md
MALOUF LAW OFFICE
Attorney for Defendants
150 East 200 North #D
Logan, UT 84321
Telephone: 752-9380

DISTRICT COURT, STATE OF UTAH, COUNTY OF CACHE

NORMAN BARBER and HELEN BARBER, husband and wife, Plaintiffs, vs.	ENTRY OF APPEARANCE FOR VON K. STOCKING AND JOINDER IN MOTION
THE EMPORIUM PARTNERSHIP, and VON K. STOCKING, DON A. WHITE, JR., and RAYMOND N. MALOUF, JR., Defendants.	Civil No. 25616

Comes now Von K. Stocking by and through his attorney Raymond N. Malouf and enters his appearance in this matter and joins with the Motion dated April 20, 1987. Entry of this appearance was approved by the Court in chambers Monday, May 4, 1987.

The Motion to Dismiss and to Strike was initially made on behalf of Defendant Raymond N. Malouf. It was supported with the Affidavit of Von K. Stocking. Mr. Stocking now joins in the Motion and requests the Court grant the relief requested therein.

DATED this 8th day of May, 1987.

Raymond N. Malouf
Raymond N. Malouf

CERTIFICATE OF MAILING

I hereby certify that on the 8th day of May, 1987, a true and correct copy of the foregoing Entry of Appearance for Von K. Stocking and Joinder in Motion was mailed postage prepaid to the following:

N. George Daines, Esq.
DAINES & KANE
Attorneys at Law
108 North Main Street
Logan, Utah 84321

M'Lissa DaFrancesco
Secretary

MAY 8 1987
BETH S. ALLEN, Clerk
Deputy

RECEIVED
'87 MAY -8 PM 4:55
CACHE COUNTY CLERK

Raymond N. Malouf/md
MALOUF LAW OFFICES
Attorney for Defendants
150 East 200 North #D
Logan, UT 84321
Telephone: 752-9380

DISTRICT COURT, STATE OF UTAH, COUNTY OF CACHE

NORMAN BARBER and **HELEN BARBER**,
husband and wife,
Plaintiff,

vs.

THE EMPORIUM PARTNERSHIP,
and VON K. STOCKING, DON A. WHITE,
JR., and RAYMOND N. MALOUF, JR.,
Defendants.

REPLY, IN SUPPORT OF
DEFENDANTS' MOTION TO
DISMISS AND TO STRIKE

Civil No. 25616

Come now the Defendants appearing herein and reply, in support of the Motion to Dismiss and to Strike, and answer the Plaintiff's Response as follows:

I

The first point made in the Motion to Dismiss and to Strike was that the Court lacked jurisdiction over the person of the partnership. Unrefuted are the facts that Plaintiffs have neither properly served the partnership itself, nor properly named the partnership a party. The Complaint fails to join an indispensable party, the Trustee of the Emporium Partnership's bankruptcy.

In their response, Plaintiffs admit the critical elements of this first argument: (1) that the Emporium Partnership is in bankruptcy; (2) that the effect of the bankruptcy is an automatic stay against the continuance and furtherance of any action against the partnership; and, (3) the stay has not been lifted. Plaintiffs seek to collect, assess or recover a claim which arose before the partnership's bankruptcy, contrary to 11 U.S.C. 362(a)(6). Plaintiffs further acknowledged that since they have

MAY 8 1987
SETH S. ALLEN, Clerk
Deputy

not obtained a lifting of the automatic stay, the limitations of the automatic stay are fully enforceable against any action against the Partnership. They said it was okay if the Complaint against the partnership is dismissed.

Plaintiffs seek to distinguish this action as one not requiring a lifting of the automatic stay to proceed against the other Defendants. However they cite no authority for this claim. While generally the automatic stay is not a bar to proceeding against a surety, co-debtor or guarantor who is not in bankruptcy, there are circumstances in which the automatic stay against a partnership will bar proceedings against other defendants. This is the case where the debtor partnership must be sued with the other Defendants. The original judgment in Civil No. 17630 was not obtained against the other three Defendants as sureties, co-debtors or guarantors, but <u>solely</u> on the basis of their status as alleged general partners. Their liability only exists if they are general partners. If the partnership is not a party then the partners cannot be sued. Liability is limited to the provisions of Section 48-1-12(2), U.C.A. These Defendants can <u>only</u> be liable <u>jointly</u> for the debt, which is and was only a partnership debt. The Plaintiffs never alleged the partners were liable as sureties, co-debtors or guarantors, but merely as partners. The original judgment is not entered jointly and severally. It cannot be entered jointly and severally because its terms did not provide for joint and several liability, the Complaint did not allege joint and several liability, and Section 48-1-12(1) limits joint and several liability to certain kinds of partnership debt arising from wrongful acts of a partner or a partner's breach of trust, neither of which were alleged in the first action. If there is no obligation of the partnership, by definition the partners cannot be liable.

Accordingly, the partners can only be liable jointly. By definition, to sue someone jointly, the partnership and all the members thereof must be made parties. See <u>Palle v. Industrial Commission</u>, 79 U.47, 7 P2d 284 (1932). Inasmuch as the partnership has not been, and cannot be, presently made a party, the Complaint must be dismissed until such time as the Plaintiffs obtain a lifting of the automatic stay and join the Trustee in the suit. Until that time, allowance of this action violates the automatic stay and the Court has no jurisdiction to proceed. If the Plaintiffs cannot prove a judgment against the partnership, they are not entitled to a renewal against the general partners. Only if the original judgment had been for joint and several liability could Plaintiffs proceed against some of the Defendants. Since liability is only joint, all must be joined, or the suit cannot proceed against any. To do that, the automatic stay must be lifted first. Section 11 U.S.C. 362(a)(6) has been held in at least one instance to prohibit a creditor from asserting a claim against a surety, co-debtor or guarantor of a debt. See Re Smith (1981, BC DC Conn.) 14 BR 956, 8 BCD 417, 5 CBC2d 545. Even though Defendants herein are not sureties, co-debtors or guarantors, this is an instance where the automatic stay properly may not, under Utah law, be violated to permit Plaintiffs to proceed against Defendants without proceeding against the partnership, which Plaintiffs admit could be dismissed because of the automatic stay.

Defendants have shown sufficient reason to require the action to be dismissed entirely because Plaintiffs have not obtained permission to proceed against the partnership. In addition, Plaintiffs have entirely failed to state a cause of action for a partnership debt, which must be done to get a renewal of this judgment.

II

Defendants's second argument to the Court was that it lacked jurisdiction over the subject matter of the suit, and that certain elements of the Complaint should be stricken. Plaintiffs fail to refer to a specific earlier decision of this or any other Court supporting their response. Plaintiffs' attempt to justify some of the relief prayed for in the Complaint by alleging the costs and attorney fee provision of the original note to the partnership survived to be ruled on again in a renewal action. In the State of Utah this is completely false. Plaintiffs failed to offer any authority to overcome Defendants' point the statute of limitations has run on the note itself, or to refute the Utah decisions of Yergensen and Gossner which squarely hold the note has become merged with the judgment and ceases to exist. Plaintiffs say there are numerous courts holding to the contrary, but fail to refer to a single one. Clearly that is not the law in the State of Utah. Thus, paragraph 7 of the Complaint must be stricken.

The prior judgment only allows a specific dollar amount of interest until the judgment is paid. The judgment has not been paid. On the very face of it, the judgment does not accrue interest. This drafting failure in the judgment is not correctable now, as has been adequately briefed in Defendants' Memorandum. First, the relief actually allowed is consistent with the prayer in the Complaint. Second, the error, if it is an error, is not curable under the holdings of Richards, Benson and Frost, all of which were argued, without rebuttal by Plaintiffs.

There has never been an earlier decision by this Court allowing interest to accrue on the previous judgment in the manner in which the Plaintiffs seek to accrue it in paragraph 6. Plaintiffs seek to correct the deficiency in the prior judgment illegally. Although they claim their judgment is a renewal, it actually is an attempt at an entirely additional cause of action going far beyond the relief allowed in the first judgment. Plaintiffs misrepresent the facts when they pretend there is an earlier decision by the Court allowing interest to accrue as they have prayed in this Complaint. They refer to no such decision, and none exists.

The very fact that instead of seeking to renew the prior judgment, Plaintiffs have attempted to state a separate cause of action, is a basis to dismiss the Complaint in its entirety.

Defendants are not limited to merely raising the defense that Plaintiffs ask more than they are entitled to.

In previous decisions by this Court in Civil No. 17630, the issue of interest accruing beyond that allowed by the face of the judgment has not been ruled on. What was ruled on, September 12, 1986, was that the Court would not allow the Defendants to change the judgment to a different amount. The Court never did say what interest existed, and did not change the limitations of the judgment. At the time Plaintiffs were not threatening to collect any more than the judgment's face allowed. Defendants' Motion was to remove the attorney fees awarded under the prior judgment, as one of those items which they were allowed to do when the Court made its decision May 21, 1979 that the questions of attorney fees and enforceability of a judgment by limited partners who were also creditors, went not to questions of the amount of the judgment or entry of a judgment, but to questions of enforcement and priorities. The Court specifically said that the Defendants could, without prejudice, take any appropriate action when the judgment was sought to be enforced. From time to time as Plaintiffs have attempted to enforce the judgment, Defendants have taken sufficient appropriate action to deny Plaintiffs any illegal recovery. Later, on November 20, 1986, the Court said that its previous decision on September 12, 1986 already covered the elements of a latter Motion to Quash writs of execution. It did not. Neither decision allowed the Plaintiffs to accrue interest beyond the amount limited by the judgment.

Plaintiffs have failed to show any authority justifying their facetious claims of an earlier decision or numerous Courts holding against the position of the Defendants. The Court does in fact lack jurisdiction over the subject matter of much of this renewal Complaint, because the Complaint seeks an entirely new cause of action. Since it does not limit the requested relief to an extension of the prior judgment, it should be dismissed in its entirety. Paragraphs 4, 6 and 7, as specified in the Motion, must be stricken.

III

The third item shown by Defendants in their Memorandum is that the Complaint failed to state a legal claim for relief. This has already been partly discussed here by the showing that the relief prayed for goes beyond the judgment which previously existed. Plaintiffs try to argue out of the rest of the issues by saying they are not obligated to credit the judgment with their December 3, 1986 bid. The Complaint fails to state a legal claim for relief by completely ignoring the requirement that Plaintiffs _must_ credit the $20,000 bid December 3, 1986. Plaintiffs somehow think they are not required to credit this until they have possession of the property. They offer no credible authority for this proposition. Possession has nothing to do with the fact of the bid. To argue under Rule 69(g)(2) that there might be a way for the Court to back them out of the bid is ridiculous. There is no possibility there can be an event to apply those provisions, for the reason that all of the interest of the Defendant Ray Malouf was bid for, without any guarantee that there in fact was an interest. To suggest there could be an irregularity in the sale is without merit. Any irregularity could only go to the benefit of Defendants. In fact, that there was no equity or interest to be sold was one of the arguments in the Motion to Quash the writ of execution filed August 22, 1986 in Civil No. 17630. In withstanding Defendants' argument, Plaintiffs themselves said " . . . whatever that interest is can be sold by the Plaintiff for satisfaction of the judgment. The interest is sold without warranty . . . No one is warranting that the interest is substantial and that it exists." (R 234, 235) Defendants already attached a copy of the bid, and Plaintiffs cannot deny it was made. Just so there will be no doubt about whether that must be credited, Defendants point first of all to the Court's ruling September 12, 1986. It required Plaintiffs to show partial satisfactions of all appropriate amounts. Second, the Utah decision of _Randall v. Valley Title_, 681 P2d 219 (Utah, 1984) held that a creditor bidding at a sale cannot bid all or part of the amount of its interest and then fail to pay cash or discharge its claims to the extent of the bid.

Plaintiffs err in thinking they can wait until after the redemption period to see whether they feel like crediting the amount of their bid. It is contrary to all authority. The Court must require Plaintiffs to credit the amount of the bid, (plus the costs they bid) against the prior judgment <u>before</u> allowing this action. Until they do so, this action should be dismissed.

Once the proper partial satisfaction of judgment has been entered, Defendants' Memorandum has shown why the remaining amount on the judgment is $344.83, or less. Defendants explained why credit should also be allowed to the extent of equity in the former Stocking home obtained by Plaintiffs November 4, 1983. Attached to the Motion was a copy of Plaintiffs' letter acknowledging the value of said home. Completely unrefuted is the Defendants' point that Plaintiffs <u>only</u> had an interest in bidding on Von Stocking's home as a result of their judgment against Von Stocking in Civil No. 17630. No possible other explanation is offered as to why they were even interested in that sale. Plaintiffs persist in saying their appearance at the Stocking Trust Deed sale was completely irrelevant to this judgment. That completely misrepresents what happened. Plaintiffs have not refuted Mr. Stocking's affidavit. In the prior action, the Plaintiffs said they " . . . simply went to the Trustee's Sale and purchased the property for the amount owing on the first mortgage. There was no credit to Mr. Von Stocking or to this judgment in the matter of that purchase." (Record 229) Those words are a lie. The attached copy of an Assignment of Trust Deed proves that on the day <u>before</u> the sale, Plaintiffs obtained the entire beneficial interest of the Trust Deed, and then only bid the first mortgage deficiency on the <u>very</u> <u>next</u> day. That enabled them to acquire Donna Stocking's equity share in the home, and allowed avoiding a homestead claim. Mr. Stocking's affidavit explains that Plaintiffs' attorney was calling him to arrange for the amount of credit that would be allowed against Civil No. 17630 if the Plaintiffs obtained Mr. Stocking's house. They did obtain the house and Mr. Stocking relied upon the promises. Plaintiffs were initiating conversations directly with Von Stocking while in the very act of dirtying their hands by the purchase of the beneficial interest in Stocking's prior Trust Deed. They should be equitably estopped from denying the home equity as credit on this judgment. The Plaintiffs in fact remained silent in excess of three years and made no efforts to collect another dime from Mr. Stocking. It appeared to Mr. Stocking that Plaintiffs indeed considered his part of the debt paid as a result of taking over his house. In saying no equity is owed Mr. Stocking over this, Plaintiffs are lying. They have failed to come clean with the Court. It is perjury to represent that they "simply went to the sale". What they did was bid as the <u>sole beneficiaries</u> of the Trust Deed, a position into which they had inserted themselves one day before the sale, solely for an advantage in collecting on this judgment.

The very fact that Plaintiffs' bid at the Stocking Trust Deed sale November 4, 1983 as <u>sole beneficiaries</u>, is an additional reason this lawsuit must be dismissed. When Barbers bid at the Trust Deed sale November 4th the sum of $33,191.94, they not only breached their agreement upon which Mr. Stocking relied which was made with him directly as per his affidavit, but they bid as the beneficial holder of the Trust Deed.

As the owner of the trust deed's beneficial interest at the time of the trust deed sale on November 4, 1987, Plaintiffs had the benefit of that trust deed to secure <u>all</u> of their judgment against Von Stocking. Plaintiffs themselves now claim this judgment was fully payable by Mr. Stocking. Plaintiffs not only failed to bid what the house was worth, but also did not thereafter seek a deficiency judgment against Mr. Stocking. Under Section 57-1-32, U.C.A. they should have done so within three months, and since they did not, they cannot sue Von Stocking for any more. Plaintiffs would be hard pressed to argue that they became the beneficial owners of that trust deed for any other reason than to obtain security on their judgment against Mr. Stocking in Civil No. 17630. They haven't offered any other explanation. Having failed to seek and obtain a deficiency judgment, they have effectively released Mr. Stocking from any exposure or liability for the renewal judgment. Since he cannot be sued, and since all the Defendants are only joint obligators, the suit must be dismissed. Under the provisions of Section 15-4-4 of the Utah Code, the release of Mr. Stocking for failure to seek a deficiency judgment effectively acts as a release against the other Defendants, since they can only be liable jointly.

CONCLUSION

The whole thrust of Plaintiff's arguments and the renewal action is to try to chastise Defendants for continually refusing to accept more responsibility, as they put it, for this judgment. As a matter of fact, this Court itself excused them from responsibility on May 21, 1979 when in Civil No. 17630 the Court said Defendants could take any appropriate action when the judgment was sought to be enforced.

Because the prior judgment only exists from a partnership debt, the partners of the partnership cannot be sued unless the partnership is joined. Since the automatic stay has not been lifted, the suit cannot proceed until it has been. Meanwhile, it and should be dismissed.

The renewal Complaint does not seek a renewal of the judgment. Instead Plaintiffs have tried to rewrite the judgment and cure its defects. They seek a new judgment entirely, not a renewal. They cannot do this.

Plaintiffs have failed to credit amounts they bid on the judgment. They have fraudulently misrepresented to the Court the true amount of the debt. Plaintiffs have further fraudulently misrepresented their responsibilities to allow equity in Von Stocking's house to apply on the judgment. That Deed was assigned to them to specifically provide security for this debt. They have forfeited their right to any further recovery against

Von Stocking by not seeking a deficiency judgment on the Trust Deed.

Plaintiffs have failed to cite any cases supporting their arguments and have failed to refute the statutes, cases, and affidavit submitted by the Defendants.

The relief requested by the Plaintiffs to dismiss the complaint with prejudice, should be granted. The provisions in the Complaint which seek for relief beyond the former judgment should be absolutely stricken.

DATED this 8th day of May, 1987.

Raymond N. Malouf

Raymond N. Malouf

CERTIFICATE OF MAILING

I hereby certify that on the 8th day of May, 1987, a true and correct copy of the foregoing Reply, In Support Of Defendants' Motion To Dismiss And To Strike was mailed postage prepaid to the following:

N. George Daines, Esq.
108 North Main, Suite 200
Logan, UT 84321

Secretary

FOR VALUABLE CONSIDERATION, the receipt of which is hereby acknowledged, FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LOGAN hereby asigns to NORM BARBER AND HELEN BARBER without warranties or representations of any kind and without recourse, all the beneficial interest and rights accrued or to accrue under that certain Deed of Trust, together with the indebtedness secured thereby, which Deed of Trust is dated March 16, 1976, was executed by Von K. Stocking and Donna L. H. Stocking, as Trustor, for First Federal Savings and Loan Association of Logan as Beneficiary, was recorded on March 18, 1976, as Entry No. 391882, in Book 189, Pages 458 - 61 of the records of the County Recorder of Cache County, Utah and covers real property situated in said county described as follows:

Assigning on void

> Part of Lot 2, Block 22, Plat "D" Logan City Survey, described as follows:
>
> Beginning at a point 27 rods South and 10 rods West of the Northeast corner of said Lot 2, and running thence West 5 rods; thence South 8 rods 8 feet and 2 inches, more or less, to the North line of Third South Street; thence East 5 rods; thence North 8 rods 8 feet and 2 inches, more or less, to the place of beginning, being situated in the North half of Section 3, Township 11 North, Range 1 East of the Salt Lake Base and Meridian.

DATED this 3rd day of November, 1983.

FIRST FEDERAL SAVINGS AND LOAN
ASSOCIATION OF LOGAN

Attest:

Gordon W. Haws, Secretary

Fred R. Hunsaker, President

STATE OF UTAH)
: ss
County of Cache)

On the 3rd day of November 1983, personally appeared before me Fred R. Hunsaker, President and Gordon W. Haws, Secretary of First Federal Savings and Loan Association of Logan, the signers of the foregoing instrument, who duly acknowledged to me that they executed the same for and on behalf of the said corporation.

Sharon M Nielson
Notary Public

Commission Expires 1/28/85

Residing at River Height Utah

Tab 5

IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE
STATE OF UTAH

NORMAN BARBER and HELEN BARBER, husband and wife,)
Plaintiffs,)
v.)
THE EMPORIUM PARTNERHSIP, and VON K. STOCKING, DON A. WHITE, JR., and RAYMOND N. MALOUF, JR.,)
Defendants)

MEMORANDUM DECISION

Civil No. 25616

The plaintiffs have filed a complaint to re-new a judgment. The judgment being granted in Civil No. 17630 on April 18, 1979. Defendants have filed a Motion to Dismiss on the grounds of jurisdiction in failing to join an indespensible party and failing to state a legal claim.

Plaintiffs are not seeking to bring any new suit on any other claim except to re-new a judgment already granted. An existing bankruptcy may stay proceedings that is working toward a judgment, but it does not estop the plaintiffs from re-newing a judgment already received prior to any bankruptcy proceedings.

From a review of the pleadings it does not appear that there is any modification or change in the relief sought except the renewal of the judgment. There is included in the renewal coutinuing of interest on the judgment. This is not a modification. The question the Court may have would be the suggested attorney's fees.

Therefore, defendants motion to dismiss is denied and counsel for plaintiff to prepare the appropriate order. Defendants have 10 days within the filing of said order to answer the complaint.

Dated this 18th day of May, 1987.

BY THE COURT:

VeNoy Christoffersen
District Judge

N. George Daines - 108 No. Main, Suite 200 - Logan, Utah 84321
Raymond N. Malouf - ~~150 East~~ 200 No., Suite D - Logan, Utah 84321

this 18th day of May, 1987
ETH S. ALLEN, Clerk
By Dotte C. Campbell
Deputy

Raymond N. Malouf/md
MALOUF LAW OFFICES
Attorney for Defendant
150 East 200 North, Suite D
Logan, Utah 84321
Telephone: (801) 752-9380

IN THE FIRST JUDICIAL DISTRICT COURT FOR CACHE COUNTY
STATE OF UTAH

NORMAN BARBER and HELEN BARBER, husband and wife, et. al. Plaintiffs, vs. THE EMPORIUM PARTNERSHIP, et. al. Defendants.	NOTICE OF OBJECTIONS TO PROPOSED FORM OF ORDER AND REQUEST FOR NOTICE Case No. 25616

Come now the Defendants and serve notice under Rule of Practice 2.9(b) that they object to the form of the Order offered by Plaintiff after the Court's May 18, 1987 Memorandum Decision. Defendants further request Notice of the actual filing date and Order filed after the Court has considered these objections. The objections are as follows:

1. In the first paragraph Plaintiffs omit the Court's findings that an existing bankruptcy may stay a proceeding working toward a judgment. That very language conflicts with the proposed language for the first Finding. Because there is an existing bankruptcy by the Emporium Partnership, an undisputed fact, it should stay these proceedings against the Emporium Partnership entirely. The old judgment expired. This action is working toward judgment. Not to stay these proceedings violates provisions of 11 U.S.C. Section 362(a)(1) and (2). This is because this attempt to renew a judgment is the continuation and employment of process in a judicial proceeding against the Debtor that was commenced or could have been commenced before the bankruptcy. It is to try to recover a disputed claim against the Emporium Partnership that arose before the bankruptcy. Neither the Plaintiff nor the Court referred to any legal authority for any exception to this automatic stay provision. The Defendants have pointed out why the stay not only applies to the Emporium Partnership, but also to the General Partners who

Deputy

are only liable if the Partnership is liable. It is critical that the Order recite the fact that an existing bankruptcy stay may stay proceedings working toward a judgment, as these proceedings are, and that the other Findings and the Order be consistent therewith.

2. The second paragraph does not state as a separate idea the Court's finding that, included in the renewal effort was an effort to get continuing interest on the judgment. The proposed form of the Order implies that the prior judgment allowed continuing interest. Since it did not, no more import should be given to this than the Court stated in its Memorandum Decision. Continuing interest was something the prior judgment did not allow. Therefore, the Memorandum Decision and the form of the Order should admit that the renewal effort represents a modification of the prior judgment. If the form of the Order is entered as proposed, the Court should be required to amend its Memorandum Decision before requiring Defendants to file their answer.

3. The third paragraph of the Order should not recite that the Court will consider awarding attorney fees, but that the Court will consider whether it has any jurisdiction to award these in the renewal action. Since attorney fees after judgment are not part of the prior judgment, the Court should state in the Order that it lacks jurisdiction to award attorney fees in this renewal action. Because in the Memorandum Decision the Court said it questioned this, the Complaint should be dismissed at least as to that portion.

Dated this 1st day of June, 1987.

Raymond N. Malouf

MAILING CERTIFICATE

I hereby certify that on the 1st day of June, 1987 a true and correct copy of the foregoing Notice of Objections To Proposed Form Of Order, re Civil No. 25616, postage prepaid to the following:

N. George Daines, Esq.
108 North Main, Suite 200
Logan, Utah 84321

M'Lis DeFrancesco

IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE
STATE OF UTAH

NORMAN BARBER and HELEN BARBER, husband and wife,

Plaintiffs

v.

THE EMPORIUM PARTNERSHIP, and VON K. STOCKING, DON A. WHITE, JR., and RAYMOND A. MALOUF, JR.,

Defendants

MEMORANDUM DECISION

Civil No. 25616

The Court made its memorandum decision regarding the questions raised in this matter. The defendants have objected to the proposed order based on that memorandum decision.

The Court has compared its memorandum decision with the order and sees no reason to change the order.

Therefore, the same will be signed as of this date.

Dated this 18th day of June, 1987.

BY THE COURT:

VeNoy Christoffersen
District Judge

Copy of the above mailed to
N. George Daines - 108 No. Main, Suite 200 - Logan, Utah 84321
Raymond N. Malouf - 150 East 200 North, Suite D - Logan, Utah 84321
This 18th day of June 1987
SETH S. ALLEN, Clerk
By Dottie C Campbell
Deputy

Number 25616-13

JUN 18 1987

BOOK 067 PAGE 620

SETH S. ALLEN, Clerk
Deputy

N. George Daines - 0803
Daines & Kane
108 North Main, Suite 200
Logan, UT 84321
Telephone: (801) 753-4403

RECEIVED
'87 MAY 20 PM 12:52
CACHE [illegible] CLERK

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

NORMAN BARBER and HELEN BARBER, husband and wife, *

Plaintiffs, *

vs. *

THE EMPORIUM PARTNERSHIP, and VON K. STOCKING, DON A. WHITE, JR., and RAYMOND N. MALOUF, JR., *

Defendants. *

ORDER

Civil No. 25616

The Defendant having filed a Motion to Dismiss this action on the grounds of jurisdiction or failing to join an indispensable party and/or failing to state a legal claim and Plaintiff having responded to said Motion,

NOW, THEREFORE, the Court enters its Order based upon its Memorandum Decision of May 18, 1987, as follows:

1. Plaintiffs are not estopped from renewing a judgment already received prior to any bankruptcy proceeding by an existing bankruptcy stay.

2. There is no modification or change in the relief sought except the renewal of the judgment including continuing interest. This is not a modification.

3. There is a request for additional attorney's fees and as to those, the Court will consider subsequently whether additional attorney's fees should be awarded but that does not constitute a

Number 2361674

valid basis for a Motion to Dismiss.

BASED THEREUPON, the Court hereby Orders that Defendant's Motion to Dismiss is denied and Defendants have ten (10) days from the date of filing of this Order to answer the Complaint.

DATED this 18 day of ~~May~~ June, 1987.

BY THE COURT:

District Court Judge

MAILING CERTIFICATION

I hereby certify that on the 26th day of May, 1987, I mailed a true and correct copy of the foregoing ORDER to the following:

Raymond N. Malouf
150 East 200 North, Suite D
Logan, UT 84321

Secretary

Tab 6

RECEIVED
JUL 3:01
CACHE CLERK

Raymond N. Malouf/md
MALOUF LAW OFFICES
Attorney for Defendant
150 East 200 North, Suite D
Logan, Utah 84321
Telephone: (801) 752-9380

IN THE FIRST JUDICIAL DISTRICT COURT FOR CACHE COUNTY
STATE OF UTAH

NORMAN BARBER and HELEN BARBER,	)	
husband and wife, et. al.	)	ANSWER AND COUNTERCLAIM
Plaintiffs,	)	
vs.	)	Civil No. 25616
	)	
THE EMPORIUM PARTNERSHIP, et. al.	)	
Defendants.	)	

Come now Defendants Von K. Stocking and Raymond N. Malouf, Jr., the only Defendants who are parties to this action, and reserving the right to answer for Don A. White, Jr., if and when he becomes a party, answer the allegations of the Complaint as follows:

FIRST DEFENSE

The Complaint fails to state a claim against Defendants upon which relief can be granted.

SECOND DEFENSE

The Court lacks jurisdiction over the Defendant partnership, which is in dissolution and has filed bankruptcy, and Plaintiff has failed to remove the effect of the automatic stay under 11 U. S. C. Section 362, and has not attempted to name the bankruptcy Trustee or serve him as a party, all of which is necessary to obtain jurisdiction over the partnership, and the other Defendants, who may only be liable if the partnership is liable.

Deputy

THIRD DEFENSE

The court lacks jurisdiction over the subject matter of this suit, which is for an amount in excess of the judgment which Plaintiff seeks to renew. The excess Complaint is barred by the six-year statute of limitations, Section 78-12-23 U. C. A., so that suit on the alleged original contract is barred

FOURTH DEFENSE

The renewal judgment seeks an award in excess of the prior judgment by seeking to modify the prior judgment to include interest which is specifically not included in the prior judgment. The Complaint further seeks $330.70 in costs allegedly incurred in ineffective attempts to enforce the alleged prior judgment, which costs were not allowed by the prior judgment, and are illegal. The Complaint further illegally seeks attorneys fees for renewing the judgment, which is not allowed by the prior judgment.

FIFTH DEFENSE

The Complaint fraudulently fails to admit the $20,000 plus costs they bid at the Sheriff's sale held by Plaintiffs on this judgment, which amount Plaintiffs have fraudulently failed to credit against their alleged claim.

SIXTH DEFENSE

The Complaint fraudulently fails to give any credit on the prior judgment for equity in real property Plaintiff realized by taking an assignment of the beneficial interest in real property owned by Von K. Stocking, then proceeding to a trust deed sale, after which Plaintiffs failed to seek a deficiency judgment, and Plaintiffs failed to credit any amount towards the prior judgment when Mr. Stocking's property had, by Plaintiffs' own admission, equity between $11,000 and $27,000. The failure to seek a deficiency judgment was a waiver of receiving any more from Von K. Stocking and all other Defendants, and Plaintiffs are estopped from this action.

SEVENTH DEFENSE

The judgment has more than been paid, inasmuch as the original judgment was $21,211.30, and the Plaintiffs have already realized the equity in Von K. Stocking's home, plus $20,000, plus costs of the foreclosure sale, plus $866.47 on the judgment, and

Defendants are entitled to a refund of the excess, plus interest, plus costs and attorney fees, plus punitive damages.

EIGHTH DEFENSE

Answering the specific allegations in the Complaint, Defendants lack information to admit the allegations in the first paragraph and deny the same. Defendants further deny that the judgment entered April 18, 1979 is the one this Complaint is attempting to renew and deny each and every allegation in paragraphs 2, 3, 4 (1st), 4 (2nd), 5 and 7 of the Complaint.

NINTH DEFENSE

Plaintiffs have waived or compromised their claim against each of the answering Defendants, either by specific agreement to release, operation of law, or laches.

WHEREFORE, Defendants pray that the Complaint be dismissed with prejudice and the Plaintiffs take nothing thereby.

COUNTERCLAIM

For cause of action against the Plaintiffs, Defendants incorporate by reference as if fully set forth all of the allegations and responses in the answer and further allege:

1. The prior and underlying judgment has either been paid or Plaintiffs and/or their Counsel are required to credit the judgment as paid and more than paid, and Plaintiffs and/or their Counsel have fraudulently refused to credit equity in Von K. Stocking's home and fraudulently and illegally failed to credit $20,000, plus costs of sale in a Sheriff's sale, which together with the $866.47 more than pays the prior judgment and for which actions the Defendants are entitled to damages in the amount of the excess payment, interest, costs and attorney fees, plus punitive damages.

2. Plaintiffs and/or their Counsel have maliciously, wrongfully and intentionally or with gross negligence, pursued their alleged claim and have now attempted to renew their alleged

judgment which action was done wrongfully and contrary to law, and with a malicious intent to disrupt the lives and property of the Defendants, and for which the Defendants are entitled to damages in the amount of at least $75,000 each.

3. Plaintiffs and/or their Counsel have intentionally abused the legal process in attempting to expand the terms of the prior judgment to collect money in excess of what was allowed, for which Defendants are entitled to their actual damages, interest and attorney fees, plus punitive damages in the additional amount of at least $60,000 each.

4. Plaintiffs and/or their Counsel fraudulently and intentionally breached their agreements with the Defendants as to the application and amount of credit to be allowed on the prior judgment for the equity of Mr. & Mrs. Von K. Stocking (Mrs. Stocking not ever being a party herein) in real property, and also as to the percentage of the alleged judgment to be paid from each Defendant, for which the Defendants are entitled to actual damages, interest and attorney fees, plus punitive damages in the additional amount of at least $90,000 each.

WHEREFORE, Defendants pray for judgment against the Plaintiffs in an amount of the excess payments on the prior judgment, plus interest, plus punitive damages in the amount of $225,000 each, plus costs of this suit and legal costs, and such other and further relief as is allowable under the law.

DATED this 23 day of July, 1987.

Raymond N. Malouf
Raymond N. Malouf

MAILING CERTIFICATE

I hereby certify that on the 23rd day of July, 1987 a true and correct copy of the foregoing ANSWER AND COUNTERCLAIM regarding Civil No. 25616, postage prepaid to the following:

N. George Daines, Esq.
DAINES & KANE
108 North Main, Suite 200
Logan, Utah 84321

M'Lisa DeFrancesco

Tab 7

Raymond N. Malouf/bh (#2067)
MALOUF LAW OFFICES
Attorneys for Defendants
150 East 200 North, Suite D
Logan, Utah 84321
Telephone (801) 752-9380

DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT
CACHE COUNTY, UTAH

NORMAN BARBER and HELEN
BARBER, husband and wife,

Plaintiffs,

vs.

THE EMPORIUM PARTNERSHIP,
et al.,

Defendants and
Third Party Plaintiffs,

N. GEORGE DAINES and
DAINES & KANE,

Third Party and
Counterclaim Defendants.

RULE 54(b) ORDER

Case No. 25616

COMES NOW the Court and enters this Order, effective October 4, 1988, affirming that on that date this Court ruled that the Order entered October 4, 1988, and all previous Orders of the Court pertaining to the Complaint, Amended Complaint, Counterclaim, Amended Counterclaim and the Third Party Complaint were final and appealable orders under Rule 54(b), U.R.C.P., and there is no just reason for delay in allowing the Defendants and Third Party Appellants who are parties in this action to bring their appeal.

Dated this 27 day of December, 1988.

VeNOY CHRISTOFFERSON
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of December, 1988, a true and correct copy of the foregoing RULE 54(b) ORDER, Case No. 25616, was mailed postage prepaid to the following:

N. George Daines
DAINES & KANE
108 North Main, Suite 200
Logan, Utah 84321

Raymond N. Malouf

Tab 8

Raymond N. Malouf/md (#2065)
Attorney for Defendants
150 East 200 North, Suite D
Logan, Utah 84321
Telephone (801) 752-9380

IN THE FIRST JUDICIAL DISTRICT COURT FOR CACHE COUNTY
STATE OF UTAH

NORMAN BARBER and HELEN
BARBER, husband and wife,
Plaintiffs,

vs.

THE EMPORIUM PARTNERSHIP,
et al.,
Defendants and
Third Party Plaintiffs,

vs.

N. GEORGE DAINES and
DAINES & KANE,
Third Party and
Counterclaim Defendants.

NOTICE OF APPEAL

Case No. 25616

Notice is hereby given that Defendants Von K. Stocking and Raymond N. Malouf hereby appeal to the Supreme Court of the State of Utah from the Orders entered in this action on or about October 4, 1988, in this First District Court by Judge VeNoy Christoffersen, which Orders were declared by the Judge October 4, 1988, to be a Final and Appealable Partial Summary Judgment, and also appeal from all related, underlying or preceding orders and issues related thereto, preserved by the Court or the parties and now ripe for appeal, including those issues raised by Defendants' Petition for Permission to Appeal, filed July 9, 1987 (Supreme Court No. 870232) the issues of which Interlocutory Order are now final and appealable.

Defendant Don A. White, Jr. appears specially, solely to the extent necessary to appeal the Orders which apply to him, and he

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denies that the Court has jurisdiction over him in this case because he was not served.

Dated this 2nd day of November, 1988.

Raymond N. Malouf
Attorney for Appellants/Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of November, 1988, a true and correct copy of the foregoing Notice of Appeal, Civil No. 25616, was mailed, postage prepaid to the following:

N. George Daines, Esq.
DAINES & KANE
Attorney for Plaintiffs
108 North Main, Suite 200
Logan, Utah 84321

Secretary

Tab 9

ymond N. Malouf/md (Bar No. 2067)
LOUF LAW OFFICES
torney for Defendants
0 East 200 North, Suite D
gan, Utah 84321
lephone: (801) 752-9380

IN THE FIRST JUDICIAL DISTRICT COURT
FOR THE COUNTY OF CACHE, STATE OF UTAH

RMAN BARBER and HELEN BARBER, sband and wife, et. al. Plaintiffs,	MOTION TO STRIKE AMENDED COMPLAINT
.	
E EMPORIUM PARTNERSHIP, et. al. Defendants.	Cache County Civil No. 25616

COME NOW Defendants, with the exception of Logan Savings and an who is not represented by the undersigned, and move to rike the Amended Complaint because the Complaint: (1) Violates e Rule for amending a complaint; (2) is an improper attempt to d additional parties; (3) is unrelated to the Complaint as led; (4) asks for relief which the Court does not have juris-ction to grant and which is not allowed by the rules; (5) is rred by statutes of limitations; and (6) improperly asks for rtition.

This Motion is supported by Defendants Memorandum in Support Motion to Strike, filed concurrently herewith.

DATED this 24 day of August, 1987.

Raymond N Malouf

Raymond N. Malouf

MAILING CERTIFICATE

I hereby certify that on the 24 day of August, 1987 a true [redacted]rrect copy of the foregoing was mailed, postage prepaid to e following:

N. George Daines, Esq.
DAINES & KANE
Attorneys at Law
108 North Main, Suite 201
Logan, Utah 84321

Secretary

ETH S ALLEN, Clerk
Dep
26 1987

25616-

Raymond N. Malouf/md (Bar No. 2067)
MALOUF LAW OFFICES
Attorney for Defendants
150 East 200 North, Suite D
Logan, Utah 84321
Telephone: (801) 752-9380

IN THE FIRST JUDICIAL DISTRICT COURT
FOR THE COUNTY OF CACHE, STATE OF UTAH

NORMAN BARBER and HELEN BARBER, husband and wife, et. al. Plaintiffs,	DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO STRIKE
vs.	
THE EMPORIUM PARTNERSHIP, et. al. Defendants.	Cache County Civil No. 25616

In support of Defendants' Motion to Strike, Defendants set forth the following reasons why the Court should strike the Amended Complaint.

FACTS

1. Defendants have already filed an Answer and Counterclaim to the Complaint. When the Answer was filed July 23, 1987 at 3:01 p.m., the Plaintiffs had not filed an Amended Complaint.

2. The Complaint seeks to renew a judgment. The prior judgment has expired. The Plaintiffs have no present right to a lien against any of the Defendants' property. The Amended Complaint seeks to add additional parties, but does not allege any of the additional parties are or may be liable to the Plaintiff for all or part of the Plaintiffs' claim against the Defendants.

3. The Amended Complaint only adds a second and third cause of action. It alleges matters wholly unrelated to whether the Plaintiffs are entitled to a judgment on the Complaint itself.

4. Plaintiffs have neither admitted nor alleged there was

25616-22

AUG 26 1987
UTH S. ALLEN, Clerk

either an irregularity in the sheriff's sale December 3, 1986, or that the property allegedly sold was not subject to execution and sale.

5. More than four years have expired since Logan Savings and Loan executed and recorded an assignment of its beneficial interest in a trust deed to Raymond N. Malouf, one of the additional Defendants Plaintiffs seek to add. No action other than the Amended Complaint has been taken against the assignment.

6. Plaintiffs have never acknowledged their obligation to offset the prior judgment, now expired, with the amount of their bid at a sheriff's sale. They thus cannot own any part of the property they want to partition.

ARGUMENT

I

NO RULES PERMIT FILING THE AMENDED COMPLAINT

Plaintiffs did not file the Amended Complaint before Defendants' responsive pleading for the Complaint was filed July 23, 1987. The Plaintiffs have not obtained leave of Court to file an Amended Complaint. Plaintiffs have not obtained the consent of the adverse parties to file an Amended Complaint, nor can they obtain the same. Rule 15(a) U.R.C.P. does not allow the filing of an Amended Complaint in this circumstance. The Court therefore lacks jurisdiction to consider the same, and the Amended Complaint should be stricken.

II

THERE IS NO JURISDICTION TO ALLOW THE ADDITION OF ADDITIONAL PARTIES

Rule 14, Utah Rules of Civil Procedure, governs the circumstances in which either the Plaintiffs or Defendants may bring in additional parties. The conditions for adding additional parties have not been alleged or satisfied by Plaintiffs. The

Plaintiffs have not alleged that any of the additional parties are or may be liable for all or part of Plaintiffs' claim against the Defendants. In fact, there is no way any of the additional Defendants could be liable for the claim in the first cause of action, because the prior judgment was not against those Defendants. The Amended Complaint illegally seeks to bring in unrelated matters in an effort to prematurely satisfy a claim against someone else for which Plaintiffs have no judgment. There is no basis or justification in the Rules of Procedure or in the Law to permit Plaintiffs to proceed against parties who may have some title or interest in real property, when the Plaintiffs do not even have a judgment on which they can execute. The Court lacks jurisdiction to permit Plaintiffs to amend their pleadings to add the additional parties for the purposes alleged. The Amended Complaint should be striken as to the third parties Plaintiffs seek to join, and as to all claims made.

III

THE AMENDED COMPLAINT EXCEEDS THE SCOPE OF THE COMPLAINT

The Amended Complaint seeks to add two causes of action. One cause of action is for a declaration of ownership of property disputably partly owned by an original Defendant. Plaintiffs bid on the interest of that Defendant after the prior judgment, which is now expired. The other cause of action is for partition of the same property. Both causes of action are unrelated to the Complaint which seeks to decide whether Plaintiffs are entitled to a renewal judgment. The Amended Complaint is inappropriate. Plaintiffs should not be allowed to piggy-back the outdated enforcement efforts onto a claim to renew a judgment. The enforcement efforts are completely separate and should be kept that way. The underlying judgment expired, and with it all of Plaintiffs' rights to take any action against the property of the

Defendants in that action. Plaintiffs will only be able to take action against property of the Defendants if and when they obtain a renewal judgment.

IV

THE SECOND CAUSE OF ACTION DOES NOT STATE A CLAIM

The second cause of action, for determination of the Plaintiffs' interest in the property they executed on December 3, 1986, is alleged by the Plaintiffs to be brought under Rule 69(g)(2) U.R.C.P. Thus, any relief under the second cause of action is dependant on an irregularity of the sale or on the fact the property was not subject to execution and sale. Plaintiffs have alleged neither an irregularity in the sale nor that the property executed on was not subject to execution and sale. Since they have not alleged these things, and since these things in fact do not appear to be the case, the Court has no jurisdiction to grant the relief under Rule 69(g)(2) U.R.C.P. In Randall v. Valley Title 681 P2d 219 (Utah, 1984), the Utah Supreme Court required a creditor bidding at a sale to credit his judgment and discharge the claim to the extent of the bid. Plaintiffs have not even done that. The only way Plaintiffs can have the benefit of Rule 69 is to allege there was an irregularity in the sale or the property was not subject to execution and sale. If they could successfully prove either of those things, then they could be excused from having to credit the prior judgment. Since they have not credited the judgment, however, they are not entitled to any claim of ownership in the property. They are not entitled to the relief asked for in the second cause of action, and it should be stricken.

V

THE AMENDED COMPLAINT IS BARRED BY THE STATUTE OF LIMITATIONS

Section 78-12-25, U.C.A., provides a four year bar to bringing actions of the type alleged in the second and third causes of action. The second cause of action attempts to invalidate the assignment of the beneficial interest in a trust deed from Logan Savings and Loan dated June 3, 1982. It has been more than five years since the assignment was given and recorded. Plaintiffs cannot now claim such assignment was invalid. Plaintiffs also appear to be attacking the judgment of Raymond N. Malouf against Raymond N. Malouf, Jr. which is dated January 15, 1982. The judgment was docketed in Cache County more than four years ago. The amount of the judgment speaks for itself. It has not been satisfied, and Plaintiffs allege no reasons why it is not a valid claim. Regardless of what Plaintiffs chose to call it, their Amended Complaint is dependant on successfully contesting these two matters. They are barred from doing this not only by §78-12-25, but also by §78-12-26.

VI

PLAINTIFFS ARE NOT ENTITLED TO PARTITION ARGUMENTS

Plaintiffs have repeatedly refused to credit the prior judgment or acknowledge they are obligated to pay what they bid at a December 3, 1986 execution sale. Now in the third cause of action they claim they own part of the property for which they have paid nothing. Such an action, if brought at all, must be brought separately, and only after Plaintiffs have credited the prior judgment. Defendants hereby request Plaintiffs to immediately release the lis pendens. Plaintiffs have shown no basis for the Court to have jurisdiction over proceedings for partition. The Court should strike the Amended Counterclaim and should also order the lis pendens removed. The lis pendens Plaintiffs admit they filed in paragraph 4 of the third cause of action in the Amended Complaint is groundless.

CONCLUSION

The Amended Complaint adds two causes of action to the Complaint. Neither cause of action is related to the Complaint. Both are improper. The Court lacks jurisdiction to consider them. Statutes of limitation bar the bringing of these actions. The Rules which would permit an Amended Complaint to be filed have not been followed. The additional parties which the Plaintiffs seek to bring in are not brought in pursuant to any applicable Rule. The Court lacks jurisdiction to allow these additional parties. The Amended Complaint is a veiled attempt to execute on a claim for which the Plaintiffs do not even have a judgment. The lis pendens Plaintiffs admit they filed is groundless and false. Plaintiffs have not established any rights in the property, have not credited what they bid, and have no right to proceed with a partition hearing. For all of these reasons the Amended Complaint should be stricken.

Dated this ~~26~~24th day of August, 1987.

Raymond N. Malouf

Raymond N. Malouf

MAILING CERTIFICATE

I hereby certify that on the 24th day of August, 1987 a true and correct copy of the foregoing Memorandum in Support of Motion to Strike, Civil No. 25616, was mailed, postage prepaid to the following:

N. George Daines, Esq.
DAINES & KANE
Attorneys at Law
108 North Main, Suite 201
Logan, Utah 84321

Secretary

N. George Daines - 0803
DAINES & KANE
108 North Main, Suite 200
Logan, UT 84321
Telephone: (801) 753-4403

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

NORMAN BARBER and HELEN BARBER, husband and wife,

Plaintiffs,

vs.

THE EMPORIUM PARTNERSHIP, and VON K. STOCKING, DON A. WHITE, JR., and RAYMOND A. MALOUF, JR.,

Defendants.

RESPONSE TO AUGUST 24, 1987, MOTION TO STRIKE AMENDED COMPLAINT

Civil No. 25616

COME NOW the Plaintiffs, by their attorneys, Daines & Kane, and respond to Defendants' Motion to Strike as follows:

1. Motion to Amend: Concurrently with this Response, Plaintiffs have filed a Motion to Amend their original Complaint. Evidently, Mr. Malouf filed a responsive pleading the same day Plaintiffs filed the Amended Complaint. Plaintiffs were not aware of a responsive pleading at the time they filed the Amended Complaint. That problem should be remedied by Plaintiffs making a formal Motion to Amend Complaint.

2. Objections to Amended Complaint: The objections of Defendants to the Amended Complaint are answered specifically as follows:

(a) Matters are Unrelated: Mr. Malouf alleges the Second and Third Causes of Action are unrelated yet they relate very specifically to whether or not Defendants

SEP 3 1987
SETH S. ALLEN, Cler

25616

Malouf, White and Stocking are to receive a credit against the Judgment owing. Mr. Malouf seems to want it both ways. He agrees Plaintiffs do not own any part of the subject home and alternatively that the amount of their bid should be credited. Clearly, one or the other is correct, but not both. The Second and Third Causes of Action are related in that they will answer that question.

(b) <u>Compliance with Rule 14</u>: Rule 14(b) specifically allows third parties to be brought in by a Plaintiff upon the filing of a counterclaim which Defendants have done in this case. More specifically, the Fifth Defense of Defendants' Answer and the second paragraph of the Counterclaim raise the very issues to be resolved by the Amended Complaint and the involvement of additional Defendants.

(c) <u>Failure to State a Claim</u>: Clearly, the Utah Rules allow for the Court to determine the interest purchased by the Plaintiffs and whether there is an irregularity. Presumably, Defendants will set that up as an affirmative defense as they have done at the Fifth Defense of their Answer.

(d) <u>Statute of Limitations</u>: Neither Section 78-12-25 nor 78-12-26 are applicable to Plaintiffs' Causes of Action. The former deals with contracts not in writing and the latter with completely unrelated topics. Plaintiffs are simply unable to respond intelligently unless Defendants can indicate the section they rely upon.

(e) Right to Partition: There is no obligation to bring a partition action separately, it follows regularly upon the other Causes of Action. No cases or authorities whatsoever are cited by the Defendants. Clearly, Plaintiffs are entitled to partition based on their bid, if that is determined valid, which is the subject of the Amended Complaint.

WHEREFORE, Plaintiffs pray that Defendants' Motion to Strike be denied and that Plaintiffs' Motion to Amend Complaint be granted.

DATED this 4th day of September, 1987.

DAINES & KANE

N. George Daines
Attorney for Plaintiffs

MAILING CERTIFICATION

I hereby certify that on the 4th day of September, 1987, I mailed a true and correct copy of the foregoing RESPONSE TO AUGUST 24, 1987, MOTION TO STRIKE AMENDED COMPLAINT to the following:

Raymond N. Malouf
Malouf Law Offices
150 East 200 North, Suite 200
Logan, UT 84321

Secretary

Raymond N. Malouf/md (Bar No. 2067)
MALOUF LAW OFFICES
Attorney for Defendants
150 East 200 North, Suite D
Logan, Utah 84321
Telephone: (801) 752-9380

IN THE FIRST JUDICIAL DISTRICT COURT
FOR THE COUNTY OF CACHE, STATE OF UTAH

NORMAN BARBER and HELEN BARBER, husband and wife, et. al. Plaintiffs, vs. THE EMPORIUM PARTNERSHIP, et. al. Defendants.	REPLY IN SUPPORT OF AUGUST 24, 1987 MOTION TO STRIKE AMENDED COMPLAINT Civil No. 25616

Defendants renew their Motion of August 24, 1987 to Strike the Amended Complaint. The Plaintiffs' response failed to set forth any valid reason to allow the amended Complaint. Defendants nevertheless reply to Plaintiffs' response as follows:

I
THE ANSWER AND COUNTERCLAIM PRECEDED THE AMENDED COMPLAINT BY FOUR DAYS

Utah Rule of Civil Procedure 15(a) requires leave prior to filing an amended pleading. It prohibits the filing of the amended complaint. Plaintiffs excuse themselves by saying the amended Complaint was filed the same day the responsive pleading was filed. The Court file says otherwise. On Thursday, July 23, 1987, at 3:01 p.m., the Answer and Counterclaim was filed. On Monday, July 27, 1987, at 9:59 a.m., the Amended Complaint was filed - without a mailing certificate.

The formal motion to amend the Complaint does not solve Plaintiffs' problem. The motion does not have any memorandum or explanation of how justice is served by permitting the amendment of the Complaint. Thus, it cannot be filed under Rule 15(a) U.R.C.P. The motion Plaintiffs' filed purportedly is based on Rule 14(b) U.R.C.P. That rule does not apply to amended pleadings. It applies to third party practice. Reading that Rule

SETH S. ALLEN, Clerk
Deputy

leads to the conclusion that Plaintiffs may only bring in additional parties if the additional parties might be liable to the Plaintiffs as a result of Defendants' Counterclaim. Again, Plaintiffs did not accompany their motion with a memorandum or any explanation showing how the additional third parties might be liable to the Plaintiffs for the Defendants' Counterclaim. Thus, the motion to amend the Complaint cannot be allowed merely because Plaintiffs filed a motion under Rule 14(b) U.R.C.P.

There is no showing of how the Plaintiffs could think that the proposed third parties are liable to the Plaintiffs because of Defendants' Counterclaim. Plaintiffs replied July 28, 1987 to the Counterclaim. Nowhere in the Reply is a defense set forth or reference made that the additional proposed third parties are liable to the Plaintiffs because of the Counterclaim. The Counterclaim was filed together with the Answer July 23, 1987. A reading of the Counterclaim fails to show any other basis for Plaintiffs to add the additional third parties as defendants in this action, notwithstanding Plaintiffs response referring to the Fifth defense, which is treated later.

The Amended Complaint should be dismissed with prejudice, and the Motion to amend the Complaint should be denied.

II

THE AMENDED COMPLAINT IS UNRELATED

The original Complaint seeks to renew a judgment. None of the proposed additional third party defendants were defendants in the prior case. The judgment was not against them, and it was not against specific property. Plaintiffs have not even attempted to show how the additional parties are or may be liable for the Plaintiffs' claim.

Plaintiffs have admitted both that they bid $20,000.00 against the interest of Defendant Raymond N. Malouf in certain property, and that the Plaintiffs have not offset their judgment by that amount. That is the fifth defense in the Answer and Counterclaim filed July 23, 1987. The second paragraph in the

Counterclaim alleges that the Plaintiffs wrongfully pursued the prior judgment and wrongfully are trying to renew it. Neither of these pleadings require the addition of the proposed third party defendants or the amending of the Complaint to resolve. Rule 14(b) U.R.C.P. does not allow third parties to be brought in, unless those third parties can be shown to be liable. The claims in the first cause of action and the Counterclaim related to it are unrelated to the proposed amendments to the Complaint. The proposed third party Defendants are not liable. Plaintiffs misapply and misrepresent the pleadings and the rules in attempting to expand their complaint. The amended Complaint and its attempt to add third party defendants should be stricken.

III

A BID IS A BID IS A BID

Keep in mind that the Complaint is only for the renewal of the alleged judgment. The Amended Complaint seeks to establish ownership or joint ownership in property which Plaintiffs allegedly executed on in connection with their original judgment. Even though the Plaintiffs have not credited the judgment by one cent for their bid, this amendment to the Complaint is a piggyback effort to improve their position after the execution on the underlying judgment. It has no place in a proceeding to determine whether the Plaintiffs can even renew their judgment.

Plaintiffs have thus far been unwilling to admit that there is an irregularity in the original sale or that the property was not subject to execution. In the underlying action, this Court allowed the Plaintiffs, in a disputed motion on the very point, to go forward with their execution sale. They must be presumed to have proceeded at their own risk. Who are they to say now that the Defendant owned no equity in the property? The only possible "problem" to Plaintiffs with their bid is whether they paid more than they wish they had paid. Just because Defendants may have turned out to have no equity after all is not a reason the sale was irregular or that the property not subject to execution and sale. Plaintiffs pretend that Rule 69(g)(2) U.R. C. P. allows them to bring the second cause of action in the Amended Complaint. It really does not. That rule is specifically set up to give the third party purchaser at a sale either a judgment against the creditor or a judgment against the debtor, is he does not end up with possession of the property bid for. It does not deal with the question of what happens if the Plaintiffs themselves bid for property, or bid for it but don't pay for it. Plaintiffs have not gone so far as to allege they bid for something that did not exist. (Since they insisted on the sale, that would help Defendants abuse of process case). They have not alleged that the property sold is not subject to execution and sale. After all, they caused it to be sold. They have not alleged irregularity in the proceedings. They have not denied their bid, and they have not paid it.

Rule 69(e)(4) U.R.C.P. says that every bid is an irrevocable offer. Failure of the purchaser to pay is contempt of the Court. Yet, Plaintiffs have refused to pay or enter the credit.

Plaintiffs say Defendants "want it both ways". Defendants a long time ago tried to show the Plaintiffs that Defendants had no equity in the home. This Court refused the proof and ordered that Plaintiffs could proceed with the sale. Accordingly, all of the right title and the interest of the Defendants to the home was sold, and the Plaintiffs bid $20,000.00, plus the cost of the sale for it. It is the Plaintiffs who chose to proceed and bid to buy whatever they bought. If that interest ends up being nothing, that does not reduce their liability for payment. The sale was offered without guaranty to the buyer, but now the Plaintiffs are trying to come back and get a guaranty. Under the circumstances, the Defendants are entitled to have it both ways because Plaintiffs elected to proceed with the sale. They are not entitled to one.

IV
THERE IS NO CLAIM

Nothing is clear from Plaintiffs' response about why the Rules allegedly allow the Court consider the Amended Complaint. To the contrary, an analysis of the pleadings and the Rules shows Plaintiffs have wholly ignored all the requirements. The interest in the home purchased by the Plaintiffs for $20,000 were conditions set by Plaintiff all the interest Defendants owned turns out to be nothing. Plaintiffs made a bad investment for which they have no claim on the Defendants.

There is nothing in connection with the Complaint to renew the prior judgment that shows that the Court can re-examine the question of what was purchased by the Plaintiffs. The only question is how long will it take the Court to order the Plaintiffs to credit the judgment with the amount of their bid plus costs of the sale, regardless of what it is Plaintiff bought.

V
THE LIMITATIONS PERIOD IS OVER

On the merits, Plaintiffs' Amended Complaint should fail. Even if the Court were to consider the merits, the Amended Complaint is barred.

First, §78-12-25 requires that actions for relief not otherwise provided for by law should be brought within four years. Plaintiffs have failed to show how their claim could be considered after four years. In their memorandum Defendants set forth the fact that the beneficial interest in the trust deed assigned from Logan Savings and Loan June 3, 1982, might be what the Plaintiffs' attack is all about in the second cause of action. The beneficial interest in that trust deed was assigned June 3, 1982 for valid consideration and has never been attacked. The Amended Complaint is brought more than five years after that assignment.

Second, Plaintiffs appear to be attacking a judgment obtained January 15, 1982, by naming the additional third party defendants. The only possibility for attack of that judgment is if the Plaintiffs think that judgment should not even exist.

Section 78-12-26 limits actions for fraud or mistake to three years. Since the judgment was obtained January 15, 1982 and has not been attacked, the Amended Complaint is at least two and one-half years late.

If neither of these claims are the basis for including the proposed third parties, then the Amended Complaint fails to state a claim. It should be stricken.

VI
WHAT PARTITION?

Plaintiffs argued in their Response that (they) Plaintiffs do not own any part of the subject home. Now the third cause of action seeks to partition that home without having first credited their bid! Both procedures (partition and bid crediting) have no business in the Complaint - which was and should only be a Complaint to renew a judgment.

If the Plaintiffs had an ownership interest in the property, then they certainly might have the right to bring an action for partition. However, they have never admitted they have an ownership interest in property, and were not even willing to credit their old judgment, as required by the Rules, prior to claiming an ownership. Accordingly, it cannot be said they have anything to partition. It is interesting that the Plaintiffs filed a lis pendens, which Defendants demanded be removed, but have yet to credit their bid against the prior judgment. Plaintiffs appear to lack faith in the validity of their claim.

Plaintiffs failed to show any connection between a partition and their efforts to renew a judgment. The judgment has not been renewed. If Plaintiffs are to file a partition claim at all. It must be in some other proceeding. Even if the judgment is renewed it only becomes effective the date of the renewal judgment. It does not obtain the date of the prior judgment. The alleged partition could not be included in any new judgment because execution ws under the old judgment. Since there is not a renewed judgment, there is no reason to allow Plaintiffs request for partition.

WHEREFORE, Defendants renew their Motion to Strike the Amended Complaint for all of the foregoing reasons.

DATED this 8 day of September, 1987.

Raymond N. Malouf

MAILING CERTIFICATE

I hereby certify that on the 24th day of September, 1987 a true and correct copy of the foregoing was mailed, postage prepaid to the following:

N. George Daines, Esq.
DAINES & KANE
Attorneys at Law
108 North Main, Suite 201
Logan, Utah 84321

Secretary

Tab 10

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CACHE COUNTY CLERK

Raymond N. Malouf - 2067
Attorney for Defendants and
Third Party Plaintiffs
MALOUF LAW OFFICE
150 East 200 North, Suite D
Logan, Utah 84321
Telephone: (801) 752-9380

THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE

STATE OF UTAH

NORMAN BARBER and HELEN
BARBER, husband and wife,

Plaintiffs,

vs.

THE EMPORIUM PARTNERSHIP,
et al.,

Defendants and
Third Party Plaintiffs,

vs.

N. GEORGE DAINES and
DAINES & KANE,

Third Party and
Counterclaim Defendants.

RESPONSIVE MEMORANDUM
FROM DEFENDANTS, OPPOSING
MOTIONS FOR PARTIAL SUMMARY
JUDGMENT

Civil No. 25616

Defendants oppose all the Motions and submit Affidavits of Von K. Stocking and Raymond N. Malouf, together with this Memorandum.

Even though Plaintiffs seek to renew a judgment entered in April 1979, they acknowledge the Amended Complaint adds additional Defendants and additional claims than were part of the prior judgment. The prior judgment renewal allegations in the first cause of action make an illegal attempt to expand the prior

NUMBER 870025616-38
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ETH S. ALLEN Clerk

judgment. The motion for partial summary judgment on the first cause of action is not separable from the motion for a partial summary judgment on the Amended Counterclaim and Third Party Complaint. The Amended Counterclaim and Third Party Complaint, however, bear directly on Plaintiffs' allegations in the second and third causes of action. In these motions Plaintiffs say nothing about summary judgment for that part of the Amended Complaint. They obviously want to put off dealing with their burden of proof in the second and third causes of action because of disputed facts. However, the disputed facts also exist in the part of the case they want reviewed now. The whole case and all the pleadings are subject to review by the Court in connection with the Motions.

FACTUAL DISPUTES REMAIN

Defendants oppose all of the Motions for Summary Judgment, <u>and oppose the Motion for Sanctions.</u> The Court has previously held there are factual disputes about some of these same issues. Defendants assert that if the equities and facts in this case are to be resolved summarily, however, justice demands a dismissal of the Amended Complaint and a hearing on the damages payable to the Defendants and Third Party Plaintiffs, plus the award of sanctions against the Plaintiffs.

Plaintiffs' Motions are not unlike the motions made on behalf of the Plaintiffs and Third Party Defendants herein in a related case. Von K. Stocking and Donna Stocking are Plaintiffs against the Barbers, Mr. Daines and his law firm, and First Federal Savings & Loan, in Civil No. 22183. There this Court has ruled conflicting factual matters must be heard, and has rejected Barbers' and Daines' efforts to dismiss the allegations of Mr. Stocking. The instant case has several issues which are related to Civil No. 22183. Summary Judgment is inappropriate here, too. The content of the same conversations between Mr. Daines and Mr. Stocking are important factual matters which must be heard in determining not only (1) the liability of Mr. Daines and the Barbers for their wrongful interference with advantageous economic relationships and contractual relationship (in No. 22183), but also (2) the application of equity from Mr. and Mrs. Stocking's home as a credit against the prior judgment here. The amount of that credit must be determined, amont other things, before a renewal judgment can be considered.

Another fact issue is the credit to be applied against the prior judgment resulting from Plaintiffs' bid of $20,000 plus costs for property on December 3, 1986. Plaintiffs say no credit is due. However, this Court ruled earlier on April 24, 1987 that the Plaintiffs were obligated to enter a partial satisfaction of judgment for the amount bid. Plaintiffs have refused to do this. Plaintiffs say nothing needs to be credited and base this on a tortured interpretation of Rule 69(g)(2). That requires a factual resolution of sale irregularities. Yet, Plaintiffs have not alleged irregularities in the sale nor have they alleged that the property was not subject to execution. Until they do one or the other of these things and prove facts to support the allegation, there is no possibility for not crediting the bid. Legally they must now credit the bid against the prior judgment before seeking to renew. Defendants briefed that issue to the Court August 24, 1987, and September 8, 1987.

Thus, at least the question of those two credits remain as factual issues. In addition, the excesses requested by the Plaintiff in the first cause of action remain as questions of fact. Another fact issue is whether the prior judgment was a judgment based on a contract which provided for interest (Defendants say it was) and whether U.C.A. Sec. 15-1-4 says that a judgment on a contract must specify the interest if interest is to accrue after the entry of the judgment. Defendants say it says this, and that the prior judgment needs to be amended to comply. Defendants note that the issue of whether a writ of execution can amend a judgment has <u>not</u> been ruled on by the Appeals Court. It is a judgment; not a writ, that Plaintiffs must renew if they are to succeed.

Issues of fact related to the foregoing include:

(1) whether the Plaintiffs or their attorney agreed to discharge Von K. Stocking from liability for the judgment if he did not file bankruptcy or if the Plaintiffs, in fact, took over the equity in the home he and his wife owned in Logan;

(2) what was the amount of equity in Von's home on December 4, 1983, that should be credited to the prior judgment;

(3) whether Mr. Stocking acted or relied on representations made by the Plaintiffs or their attorney;

(4) whether the property bid on by Plaintiffs and their counsel December 3, 1986, was subject to the judicial sale they caused to happen;

(5) whether the same sale had irregularities;

(6) whether the Court earlier required the Plaintiffs to enter a partial satisfaction of judgment for that $20,000 bid, and what facts, if any, justify Plaintiffs not having done so yet;

(7) what the actual language of the prior judgment of April 1979 says and whether that language is being exaggerated and added to in Plaintiffs' Amended Complaint;

(8) whether Plaintiffs can get attorney fees, costs and after-accruing interest on the prior judgment without amending the prior judgment; and

(9) whether a writ of execution on the prior judgment, if for more than the judgment stated on its face, can amend the amount that can be awarded on a renewal judgment when the prior judgment has expired.

(10) whether the prior judgment is a lien now that it has expired.

ADDITIONAL ARGUMENT

It is not always required that a party offer affidavits in opposition to motions for summary judgment in order to avoid summary judgment. Where a party opposed to summary judgment submits no documents in opposition, summary judgment can nevertheless only be granted if the moving party is entitled to judgment as a matter of law. That is the purpose of Rule 56, and Plaintiffs have not met their burden of proof in establishing as a matter of law they are entitled to judgment or even partial summary judgment.

Defendants have submitted responsive affidavits from Von K. Stocking and Raymond N. Malouf. The Court must evaluate all evidence and all reasonable inferences fairly drawn from the evidence in the light most favorable to the party opposing the motion for summary judgment. (Bowen v. Riverton City, 656 P2d 434 (UT 1982). The Motions for Partial Summary Judgment and Sanctions should be denied based on the pleadings and the Affidavits submitted herewith.

The Plaintiffs have failed to set forth the facts they claim are undisputed which support their Motions for Summary Judgment. All of the material facts are disputed, as well as the facts implied and directly raised by the affirmative defenses in the Answer and Counterclaim, Amended Answer and Counterclaim, and Third Party Complaint. The Affidavits of Mr. Daines and Mr. and Mrs. Barber are disputed by Defendants' Affidavits, except as to residency of the Barbers. The allegation in all three of Plaintiffs' Affidavits, that they caused a lis pendens to be filed against real property even after the prior judgment expired, is damming to their case and supports Defendants' position that sanctions should be awarded against the Plaintiffs and Third Party Defendants.

The legal and factual question of jurisdiction over the Partnership and individuals also exists. The Partnership has not been served. The Court cannot have jurisdiction, even only on the alleged general partners, unless the underlying debtor, the Partnership, is properly also a party.

The Motions by Plaintiff and Third Party Defendants should be denied. They would make the facts appear other than they are and avoid entirely the factual questions which are at the center of this effort to expand the original judgment in many illegal particulars. Plaintiffs' convoluted analysis and expansion of the Appeals Court decision (rendered on the enforceability of a writ on the prior judgment, and which did not address the judgment itself), is full of fantasy and embellished with fiction. The effect of the Appeals Court ruling on the prior judgment only goes to the timeliness of appeal of a writ of execution. Since that judgment has expired, the underlying writ has expired and a ruling on the writ has no bearing which controls the present case. To grant two partial summary judgment motions, all material facts and the law in this case have to be addressed. Inasmuch as the Plaintiffs have acknowledged there are new factual and new legal issues being brought forward for decision, summary judgment is not appropriate.

In an effort to pretend there is one less factual dispute, Plaintiffs acknowledge the weakness of their second cause of action and the correctness of Defendants' Counterclaim by abandoning to the Court the question of whether their $20,000 bid amount is due as a credit on the prior judgment. The Court already ruled that the bid should have been entered as a partial satisfaction. The only irregularity alleged by Defendants in that sale (and irregularities are needed to justify use of Rule 69(g)(2)) was the underlying writ which has been appealed. Irregularities in that sale have not been alleged by Defendants. Yet, Plaintiffs rely on an argument that Defendants made allegations of irregularities. This is an attempt to argue pleadings not actually made by the Defendants to meet Plaintiffs' own burden to prove no credit is due. The second cause of action is intertwined with Plaintiffs' Motion for Partial Summary Judgment, and the issues directly or indirectly related thereto should be interpreted favorably to the Defendants in ruling on the motions. The Motion for Partial Summary Judgment should be denied, and the second and third causes of action ought to be dismissed.

The Court has not analyzed what is owed to satisfy the prior judgment. It has merely allowed the deputy clerk to rubber stamp and seal the writ proposed by Plaintiffs. That is not a thinking, knowing decision process. Where the rubber stamp is affixed to a writ in excess of the judgment, the writ is void and not binding on renewal actions. A factual question to be specifically addressed by the Court includes a comparison of the prior judgment with prior writs, to make sure only the prior judgment is part of the action.

The filing of an illegal lis pendens is indeed actionable under U.C.A. Sections 38-9-1 to 4.

Res judicata does not apply in this case because the Plaintiffs have sought to include many more Defendants than were part of the original action, and the matters actually disputed in this case differ from those heard by the Appeals Court in the prior action.

WHEREFORE, Defendants pray that the Motions for Partial Summary Judgment be denied, the Motion for Sanctions be denied and that the Court consider granting sanctions against Plaintiffs.

DATED this 30 day of June, 1988.

Raymond N. Malouf

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed, first class postage prepaid, a copy of the foregoing RESPONSIVE MEMORANDUM FROM DEFENDANTS, OPPOSING MOTIONS FOR PARTIAL SUMMARY JUDGMENT, this BH 1st day of ~~June~~ July, 1988, to:

N. George Daines
Attorney for Plaintiffs
Daines & Kane
108 North Main, Suite 200
Logan, Utah 84321

Barbara Harrison
Secretary

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CACHE CLERK

Raymond N. Malouf - 2067
Attorney for Defendants and
Third Party Plaintiffs
MALOUF LAW OFFICE
150 East 200 North, Suite D
Logan, Utah 84321
Telephone: (801) 752-9380

THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE

STATE OF UTAH

NORMAN BARBER and HELEN
BARBER, husband and wife,

Plaintiffs,

vs.

THE EMPORIUM PARTNERSHIP,
et al.,

Defendants and
Third Party Plaintiffs,

vs.

N. GEORGE DAINES and
DAINES & KANE,

Third Party and
Counterclaim Defendants.

AFFIDAVIT OF
RAYMOND N. MALOUF

Civil No. 25616

STATE OF UTAH)
) ss.
COUNTY OF CACHE)

COMES NOW, Raymond N. Malouf, and deposes and states the following in opposition to the Plaintiffs' Motions for Partial Summary Judgment and in opposition to Plaintiffs' Motion for Sanctions:

1. I am counsel for Defendants and Third Party Plaintiffs herein.

49-37

JUL 1 1988
ALLEN Clerk

2. I know there are several factual issues which are disputed between the Plaintiffs, the Defendants, and the Third Party Defendants which include, but are not limited to those shown by the Affidavit of Von K. Stocking.

3. I am not the legally authorized agent to receive process on behalf of The Emporium Partnership ard have contested the jurisdiction of this Court against the Partnership because the Partnership's legal representative is the bankruptcy trustee, James Z. Davis.

4. I know the prior judgment was not against anyone except myself, Von K. Stocking, Don White, and The Emporium Partnership, and that it was not against any of the other Defendants. The prior judgment in No. 17630 was entered more than eight (8) years ago.

5. Among additional fact issues to be resolved is how much should have been credited on the prior judgment because Plaintiffs bid $20,000 December 3, 1986 (plus costs), for my interest in certain property. Plaintiffs have failed and refused to enter a partial satisfaction to the extent of the $20,000 bid plus the costs. On April 24, 1987, I know the Court entered its Order quashing subpoenas against some of the Defendants. In its Findings of Facts and Conclusions of Law, the Court held that the Plaintiffs were required to enter a partial satisfaction because of their bid at the sale on December 3, 1986, but the Plaintiffs have not done so.

6. Even though the Court found that Plaintiffs should have acknowledged their obligation to reduce the prior judgment by the

amount of the bid, they did not, and so there are no facts to support any Plaitiff interest in the property, and so Plaintiffs, as a matter of fact, should not be trying to act on that property while they try to renew the old judgment. Factually it is a claim for beyond the original judgment.

7. It is untrue the Court has jurisdiction under Rule 69(g)(2), U.R.C.P. because the Plaintiffs, who claim the benefit of that Rule, have neither alleged nor shown there was an irregularity in the sale, and have not alleged that the property was not subject to execution. I know the Defendants have not alleged irregularities in the sale. The Defendants have only alleged that the property was not subject to execution and have asked for damages for that in the amended counterclaim, paragraphs 2 and 6. The Plaintiffs have not admitted the property was not subject to execution.

8. The fact of Plaintiff's bid December 3, 1988, supports the factual finding that credit must be made to Defendants for the $20,000 plus costs bid by Plaintiffs.

9. Even though the Plaintiffs insist they don't have to make said credit, the Court has said they should have done so and the Defendants have said they must. There is a question of fact before the Court as to the date and amount of credit for that bid to the prior judgment, resulting in a factual question of how much, if any, remains to be paid on a possible renewal judgment.

10. October 3, 1986, the Plaintiffs wrote a letter to me saying they wanted $12,500 which was what they said was my share

of the debt. Only two months later they bid the $20,000 which they have refused to credit on the judgment. The excess bid should be paid to Defendants, and it was asked for in paragraph 2 of the amended counterclaim.

11. Based on the foregoing representations from the Plaintiffs representations, I believe $7,500 was paid in excess of any amount that should legally or equitably be required from me. I should not even have been a party to the renewal Complaint.

12. I know that Plaintiffs and Third Party Defendants have not yet paid anything to the Defendants that is or may be required by the Counterclaim and Third Party Complaint.

13. I am familiar with the Affidavit of Von K. Stocking and know that I was not part of the negotiations between Mr. Stocking and Mr. Daines and did not know that Mr. Daines and the Barbers had acquired the beneficial interest in Mr. and Mrs. Stocking's property during the course of those visits with Von K. Stocking. The promises made to and negotiations with Mr. Stocking were not made through me but were initiated and conducted in secret by the Third Party Defendants. I know Mr. Stocking relied on the promises and statements made by Mr. Daines.

14. I know the original Complaint in No. 17630 was for enforcement of a promissory note or contract.

15. I know the original Complaint in No. 17630 did <u>not</u> ask for interest on the judgment until it was paid, and I know neither the Complaint, nor the Judgment which followed the complaint, were ever amended.

16. I know that the Judgment was on a contract and that the interest which Plaintiffs seek to add to that judgment was not specified in the Judgment. The Plaintiffs themselves have acknowledged that the language of the judgment does <u>not</u> say interest accrues after the judgment. I know that the decision of the Utah Court of Appeals did not reach the merits of Plaintiff's tortured argument for reading extra words into the judgment. Nor did it address the question of amending the judgment to permit interest to accrue contrary to its terms. It merely held that the Defendants did not appeal the Court's allowance of execution writs soon enough. It did not address the question of interest accruing after judgment on a contract where the judgment didn't specify the rate of interest that proper pleadings might have allowed it to.

17. I know the original judgment did not provide for the Plaintiffs to recover attorney fees incurred in trying to collect the judgment, and did not allow a Complaint to renew judgment to seek additional attorney fees.

18. At the time all pleadings in this case were filed, to the best of my knowledge, information and belief after reasonable inquiry, such pleadings were well grounded in fact and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and were not interposed for improper purposes or unnecessary delay.

19. The factual questions about crediting the $20,000 bid, and the Plaintiffs' Trust Deed Foreclosure Sale against Mr.

Stocking's home are both disputed. Both these factual disputes exist in addition to the question of interest accruing after entry of the prior judgment. The question of interest accruing on the prior judgment still is a factual question. At worst, the holding of the appeals court on this point only goes to the question of whether a writ of execution was timely appealed from. It did not address the substance of the writ. The renewal judgment cannot seek to renew writs of execution on the old judgment, but must be limited to the actual prior judgment. The actual prior judgment does not support the relief requested by the Plaintiffs. Section 15-1-4, U.C.A. does not support it either because this judgment is a judgment on a contract, not some other judgment. Only judgments other than on contracts may accrue interest after entry whether or not the judgment provides it. The Defendants seek and are entitled to the strict reading of the statute.

20. Plaintiffs alleged they made a demand for changes to Defendants' pleadings, and demanded that Defendants accept their interpretation of the breadth of the appeals court decision, on Thursday, June 16, 1988. Without any consideration for the undersigned's schedule or availability, they insisted on an affirmative written response by 1:00 p.m four days later, or by Monday, June 20. As a matter of fact, I was gone Thursday and Friday and knew nothing of their demand. Nevertheless, at 12:10 p.m., June 20, 1988, Plaintiffs hand delivered all the motions which are presently before the Court. Their actions show that they did not believe their demand meant anything, and that response to

the demand was not seriously intended.

21. I have read the foregoing Affidavit and know the contents to be true and correct of my own personal knowledge.

DATED this 30 day of June, 1988.

Raymond N. Malouf
Raymond N. Malouf

SUBSCRIBED and SWORN TO before me this 30th day of June, 1988.

BARBARA L. HARRISON

Barbara L Harrison
Notary Public
Residing in: River Heights, UT

My Commission expires:
1 Dec. 1991

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed, first class postage prepaid, a copy of the foregoing AFFIDAVIT OF RAYMOND N. MALOUF, this ~~30th~~ 1st day of ~~June,~~ July 1988, to: BH

N. George Daines
Attorney for Plaintiffs
Daines & Kane
108 North Main, Suite 200
Logan, Utah 84321

Barbara Harrison
Secretary

RECEIVED
JUL -1 11:35
CACHE [illegible] CLERK

Raymond N. Malouf - 2067
Attorney for Defendants and
Third Party Plaintiffs
MALOUF LAW OFFICE
150 East 200 North, Suite D
Logan, Utah 84321
Telephone: (801) 752-9380

THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE

STATE OF UTAH

NORMAN BARBER and HELEN
BARBER, husband and wife,

Plaintiffs,

vs.

THE EMPORIUM PARTNERSHIP,
et al.,

Defendants and
Third Party Plaintiffs,

vs.

N. GEORGE DAINES and
DAINES & KANE,

Third Party and
Counterclaim Defendants.

AFFIDAVIT OF
VON K. STOCKING

Civil No. 25616

STATE OF UTAH)
) ss.
COUNTY OF CACHE)

COMES NOW, Von K. Stocking, and being first duly sworn, deposes and states the following facts, in opposition to the Plaintiffs' Motions for Partial Summary Judgment:

1. I am a Defendant and Counterclaimant in this action. Together with my wife, Donna Stocking, I am a Plaintiff in an

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action against the Plaintiffs herein, the Third Party Defendants and against First Federal Savings & Loan, which action is also filed in this Court as Civil No. 22183. I was also a Defendant in Civil No. 17630, which this present action is partly seeking to renew and partly seeking to expand.

2. I know that one of the questions of fact in this present action is how much money should be credited on the prior judgment, No. 17630, so that the Court will know how much, if any, the Plaintiffs can legally renew.

3. I know that in Civil No. 22183, in October of 1987, this Court said that there was a dispute of facts about whether the Plaintiffs and the Third Party Defendants herein interfered with my rights in the home First Federal was foreclosing on, and to which the Plaintiffs purchased the beneficial interest in. I know Plaintiffs bought that interest because of the judgment in Civil No. 17630.

4. Because of the interference in my rights to that home, I know that the Plaintiffs and the Third Party Defendants, together with First Federal Savings & Loan, took my equity in the home without giving credit on the judgment, contrary to discussions had with me. I know that they refused and failed to apply any of that equity to partially satisfy the judgment in No. 17630, even though I relied on their promises to allow between $12,000 and $15,000 as a credit against the very judgment which the Plaintiffs now seek to renew. I know the Plaintiffs here only bid $33,191.94 at the Trust Deed sale of my former residence November 4, 1983, even

though they wrote us a letter August 29, 1983 where they themselves said the property was worth between $45,000 and $60,000.

5. Even though I was represented by an attorney at the time, Mr. George Daines called me directly to discuss how much equity to apply against the judgment in No. 17630, and he called me several times about this between October 31 and November 3, 1983, while I was trying to decide on curing my default or agreeing to the offers made for the Barbers by Mr. Daines.

6. That in the course of those conversations, Mr. Daines did not tell me that the Barbers were buying the beneficial interest in that property, which allowed them to take advantage of me, and now appears to be their justification for not crediting anything on the prior judgment.

7. That besides the promises to apply money on the judgment, Mr. Daines told me that if everything fell apart and a sale occurred, his clients would still have no problem in releasing me from the judgment. I relied on his promises. Mr. Daines also told me that his clients only wanted to collect against Defendants to the judgment the same percentage of the judgment as each of the three alleged general partners owned in The Emporium Partnership. In discussing the amount of the judgment to be offset, I relied on his representations for this also.

8. Also in our discussions Mr. Daines said he was worried I would file for bankruptcy to stop the Trust Deed Sale by First Federal, and that he and his clients did not want me to do that and would discharge me from any debt owed to the Barbers if the sale

was allowed to proceed.

9. Mr. Daines also told me that he had 100% authority to represent or settle on behalf of the Plaintiffs.

10. These conversations were initiated by Mr. Daines. In them he expressed a great deal of animosity toward my attorney, and encouraged me to exclude him from the negotiations we were having.

11. I know the residence I had that was lost to the Plaintiffs here was worth at least the $60,000 they admitted it might be worth.

12. That I know that The Emporium Partnership is still in bankruptcy and that so far as I know the trustee in bankruptcy, James Z. Davis, is the only official agent of the Partnership, but has not been named as a party or served on behalf of the Partnership.

13. I know at the time I was served and even at present I am not the agent for the Partnership, but the Partnership was in dissolution.

14. That I knew the original judgment only allowed for the interest that the Complaint asked for, which was less than the contract allowed.

15. I know the original judgment was on a promissory note which Don White and I signed to the Plaintiffs, and I know the original note or contract expired before the prior judgment expired.

16. I know the prior judgment did not allow for attorney fees in collecting on the judgment or for attorney fees in renewing the

judgment.

17. I know the original judgment did not recite that interest would be 12% from the date of the judgment until the judgment was paid, but it said other language which is different than the contract provided and is different than what the complaint or the amended complaint here is seeking.

18. I know the original judgment was only against The Emporium Partnership and myself, Don White, and Ray Malouf, and was not against any other Defendants which the Plaintiffs are trying to add to this action.

19. I know that just as there are questions of fact in Civil No. 22183 about interference with my rights by the Plaintiffs and the Third Party Defendants, that there are similar questions of fact in this action.

20. The Plaintiffs have had the benefit of all of the equity in my former residence, and the equity of my wife for which no consideration was given, plus the incomes and rents from the property since they took on November 4, 1983. I should be entitled to have this Court rule on the amount of that equity and cause the same to be entered as a credit against the former judgment to see whether there is anything left for the Plaintiffs to sue for to renew a judgment. I should also be excluded as a Defendant from the renewal judgment because of the monies received from me by the Plaintiffs.

21. I have read the foregoing Affidavit and know the same to be true and correct.

DATED this 29 day of June, 1988.

Vonk Stocking
Von K. Stocking

SUBSCRIBED and SWORN TO before me this [illegible] day of June, 1988.

Notary Public
Residingin: [illegible]

My Commission expires:
[illegible]

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed, first class postage prepaid, a copy of the foregoing AFFIDAVIT OF VON K. STOCKING, this ~~30th~~ 1st day of ~~June~~ July, 1988, to: ~~BH~~

N. George Daines
Attorney for Plaintiffs
Daines & Kane
108 North Main, Suite 200
Logan, Utah 84321

Barbara Harrison
Secretary

Tab 11

RECEIVED
AUG 17

Raymond N. Malouf/md (#2067) (134:EMPBARRE.RMP)
MALOUF LAW OFFICES
Attorneys for Defendants; Third Party Plaintiffs
150 East 200 North, Suite D
Logan, Utah 84321
Telephone (801) 752-9380

IN THE FIRST JUDICIAL DISTRICT COURT
COUNTY OF CACHE, STATE OF UTAH

NORMAN BARBER and HELEN BARBER,
Plaintiffs,

vs.

THE EMPORIUM PARTNERSHIP, et al.
Defendants /
Third Party Plaintiffs,

vs.

N. GEORGE DAINES and DANES & KANE,
Third Party Counter-Claim Defendants.

DEFENDANTS' RESPONSE TO SUPPLEMENTAL MEMORANDUM, OPPOSING PENDING MOTIONS

Civil No. 25616

Two major material issues of fact remain as a bar to the renewal of any judgment against the Defendants. First, the parties disagree about whether the original judgment allows post judgment interest to accrue. This factual question is raised by Defendants' fourth defense in the original answer and counterclaim. Second, the parties dispute the amount of credit against a renewal judgment - whatever its amount - that must be given for payment, equitable offsets and a bid by the Plaintiffs. This factual issue is raised by the fifth, sixth, and seventh defenses in the original Answer and Counterclaim. That these material issues of fact, plus others, remain is established by the affidavits executed June 29 and June 30, 1988, and previous pleadings and affidavits from Defendants.

Even though Plaintiffs seek summary judgment on the first so-called cause of action, they have still not listed the undisputed facts that Rule 2.8(d) requires be listed. Accordingly, Defendants herewith set forth the disputed material facts apparent from the first cause of action:

1. The Complaint seeks not to "renew" but to change and improve the judgment made April 18, 1979 in Civil No. 17630. The First Cause of Action is not just an effort to "rubber stamp" or extend the prior judgment. It is an attempt to amend it.

2. The Defendants are entitled to have most of the prior judgment satisfied from the payments, uncredited bid made by the Plaintiff, and equitable offsets acquired by the Plaintiffs in Mr. and Mrs. Von Stocking's real property.

3. The Defendants are entitled to more credit than $866.47. That December 31, 1984 payment should be credited against the principal amount of the judgment and not to the interest that the Plaintiffs accrued after the judgment. Defendants are also entitled to an equitable offset from the judgment for the Stocking property of between $11,000 and $27,000 (approximately) and to credit for the amount Plaintiffs bid at a sheriff's sale, December 3, 1986, in the amount of $20,000, plus costs.

4. The most Plaintiffs are entitled to under their prior judgment was $21,211.30. There is no authority or right in that judgment for costs accrued in attempting to enforce that judgment to be added to the renewal claim. Yet, Plaintiffs have sued for $41,751.43.

5. The amounts claimed by the renewal complaint in excess of $21,211.30 are not allowed, because action on the contract is

barred by the statute of limitations, §78-12-23 U.C.A. (third defense), and the holding in Yergensen v. Ford, 16 Utah 2d 397, 402 Pac 2d 696 (1965): The note or contract is replaced by the judgment terms, and the judgment did not include all the terms in the contract.

6. A new judgment in a form asked for by the Plaintiffs would not be a renewal judgment, limiting the judgment to the language of the original judgment, and the first cause of action should not replace the actual judgment from Civil No. 17630.

7. Attorney's fees on renewing the judgment are not allowed by contract or by the prior judgment in this case.

8. The filing for bankruptcy protection by the Emporium Partnership, November, 1979, after the judgment in Civil No. 17630 was granted April 18, 1979, in fact bars renewing that judgment without permission of the Bankruptcy Court. That permission has not been granted.

9. The Plaintiffs' failure to reduce the amount of their claim by the $20,000 (plus costs) bid December 3, 1986, is alleged to be a fraudulent act against the court and the Defendants, for which the Plaintiffs assert they are entitled to actual and punitive damages.

10. Plaintiffs' failure to provide any equitable offset for the equity in the Stocking's property is alleged to be a fraudulent act for which the Defendants are entitled to actual and punitive damages.

11. Given the original judgment, the original complaint and the original findings of fact, to accrue interest after April 18, 1979, on the judgment sought to be renewed is in fact a modification of the judgment which is material and illegal. Plaintiffs' action does not just renew a judgment, but really is an effort to modify it by asking for amounts in excess of what can be due from the face of the judgment. Defendants claim the failure to give equitable offsets and credit for bids made was not only fraudulent but also illegal and malicious and that it disrupted the lives and property of the Defendants, for which the Defendants are entitled to actual and punitive damages.

12. Defendants have alleged, and supported by their affidavits, a basis for their claim that Plaintiffs and/or their counsel both fraudulently and intentionally breached promises made to Defendants as to the equitable credit to be allowed for property once belonging to Mr. and Mrs. Von K. Stocking.

13. Plaintiffs and/or their counsel made promises about the percentage of the total claim (whatever it is) to be paid from each Defendant, which promises were relied on by the Defendants and were breached by the Plaintiffs, for which the Defendants are entitled to actual and punitive damages.

14. Defendants have alleged that the Plaintiffs or their counsel encumbered real property of the Defendants or caused documents

> asserting claims against real property to be filed or recorded, when in fact these claims were groundless and for which the Defendants are entitled to treble actual damages or $1,000, whichever is greater, as well as attorney's fees and costs as allowed by U.C.A. §38-9-1.

The foregoing material issues of fact all arise from the First Cause of Action, Answer and Counterclaim; items 12, 13, and 14 are also applicable to the Third Party Complaint (along with others). They are disputed factual issues between the parties. Their existence forecloses granting summary judgment.

Most of the foregoing disputed fact issues are plainly apparent from the pleadings and affidavits, and need no argument. However, Defendants argue the more important ones and respond as follows to the Plaintiffs' Memorandum.

EFFECT OF COURT OF APPEALS RULING

The Court of Appeals ruled that Defendants' appeal of issues raised in Civil No. 17630 was not timely. The ruling did <u>not</u> address the merits of any other issue. It particularly did not discuss methods of modification of judgments, and did not discuss crediting amounts Plaintiffs bid or equitable offsets. Because the court ruled only on the timeliness question, it did not examine the relationship between the language of the judgment, the complaint it was based upon, or the application of §15-1-4 U.C.A.

The decision of the Court of Appeals was February 12, 1988. The Amended Answer and Counterclaim and Third Party Complaint were signed September 23, 1987. The Court of Appeals' decision does not address the issues raised by the current case.

WHAT EXACTLY DOES THE ORIGINAL JUDGMENT PROVIDE?

The May 18, 1987 Memorandum Decision by this court that "There is included in the renewal, continuing interest on the judgment. This is not a modification." can be explained. The Court assumed that the original judgment allowed interest to accrue. It is important to examine the original judgment to realize it did not provide for the accrual of interest after the judgment. The fact that it did not was not a mere oversight. That the judgment did not provide for accrual of interest after the judgment date is <u>not</u> cured by U.C.A. §15-1-4.

November 12, 1986, the Plaintiffs admitted in pleadings filed in this court in Civil No. 17630, that the judgment was "not as clear" as it should be, but they wanted to rely on state statute to have interest on this judgment anyway. Mr. Daines said:

> Although the judgment language is not as clear as one would like, Plaintiffs believe it is sufficiently clear that State law provides that all judgments require interest and that it does not need to be restated in each judgment which is filed by the court. (Response to Motion, November 12, 1986, Civil No. 17630).

That is an admission the judgment does not support post judgment interest. Plaintiffs made the same admission to the Court of Appeals on page 7 of their Respondent's Brief wherein they stated:

> The judgment recites that the interest is at 12% <u>but does not specifically state that it continues to accrue after rendition of the judgment</u>. (<u>Id.</u> page 7, emphasis added.)

Of cause the Appeals Court did not address the issue on the merits, but the admission proves Defendants' point. Plaintiffs justify the omission and their accrual of the interest by relying on <u>Dairy Distributors, Inc. v. Local 976</u>, 12 Utah 2d 85, 396 Pac 2d 47 (1964) and §15-1-4 U.C.A. to argue the merits of their claim. They also try to explain what must have been intended by the inclusion of the figure $2,180 for interest, and the language "from the date hereof". They explain that it must have meant from a period before the judgment entered until the date of the judgment. They specifically say "the date hereof" must mean the date of the Complaint. That's probably true, but the fact remains the judgment is deficient. It does not allow accrual of post judgment interest. The judgment has never been amended.

THE VERY WORDS

What the judgment says is consistent with the prayer in the complaint which only asks for "interest additional at the rate of 12% per annum <u>until judgment</u>"; and is consistent with the Findings of Fact and Conclusions of Law which only provided for "accrued interest at the rate of 12% per annum from date hereof until paid in the amount of $2,180" (Record pages 2, 37, & 38). The judgment itself has the same identical language. It simply grants interest of a limited amount, but all the Complaint asked for, and does not provide for interest to accrue after judgment.

Since the judgment does not provide for interest to accrue, Plaintiffs had to rely on the <u>Dairy Distributors</u> case and U.C.A. §15-1-4 to try and argue that interest can accrue after judgment. Even though the Appeals Court never got to the merits of these arguments, discussion is appropriate. The distinction in <u>Dairy Distributors</u> is that there a clerk erred and did not fill in the blanks provided in the judgment form for interest after judgment. The reasons that case cannot control this case are: (1) there were no blanks to fill in; (2) there was no inadvertance by the clerk; and, (3) the court never made a finding that interest can accrue after judgment. Nor was it logical the court should have allowed interest to accrue, because the Complaint, for whatever reason, failed to ask for it.

Similarly, solely because <u>Dairy Distributors</u> was a clerk error, §15-1-4 U.C.A. could be applied to allow interest to accrue on the <u>Dairy Distributors</u> judgment. However, it can't be applied that way here. Section 15-1-4 U.C.A. says that:

> Any judgment rendered on a lawful contract

> shall conform thereto and shall bear the interest agreed upon by the parties, which shall be specified in the judgment; other judgments shall bear interest at the rate of 12% per annum. (Emphasis added).

As can be seen, the judgment did not provide what it had to provide in order to give the Plaintiffs what they now ask for. This oversight by Plaintiffs' counsel and failure to amend by the Plaintiffs must be applied to their detriment. The Defendants are entitled to the benefit of the pleadings and the statute. The Plaintiffs have not shown any authority to the contrary. Particularly, the Plaintiffs have failed to show any authority or justification for an attempt to amend a judgment by filing a writ of execution in an amount other the amount provided for in the original judgment.

Any renewal judgment must be limited to the specific language of the original judgment, defective as it may have been, because it was not amended.

WHAT ABOUT AMENDING THE JUDGMENT?

A long list of Utah decisions dating from 1895 squarely support the position that the only basis for changing the amount of money allowed by a judgment is for the judgment itself to be amended. Richards v. Siddoway, 24 Utah 2d 314, 471 Pac.2d 143 (1970), is often referred to for the distinction between judicial and clerical errors. The court must remember that the problem with the judgment in Civil No. 17630 was not a clerical one from having wrongly recorded a judgment as entered. It was intentional or it was at most a judicial error. That does not mean the judge erred, but that there was an error by someone in renderring the judgment actually entered It wasn't a last minute error in this case, because the judgment conformed to the wording in the original pleadings. Richards held that a judicial error can only be cured by a timely motion for a new trial, amended findings, appeal, or a new action. Here, the error wholly belongs to the Plaintiffs and their counsel, and the judgment entered does not provide for post-judgment interest. Any writs of execution are in conflict with the judgment, and since the judgment is still contested, must be read as subordinate to the judgment. They certainly cannot amend the judgment.

Moreover, the court does not have jurisdiction to unilaterally change the judgment even if it wants to prefer the Plaintiffs. In Benson v. Anderson, 14 Utah 334, 47 Pac. 142 (1896) the Supreme Court said that judicial tribunals may not exercise revisionary power over a judgment after it has passed away from the judge. There, an effort to change a judgment six months after it was entered was considered too late. In Frost, et al. v. District Court, et al., 96 Utah 106, 83 Pac.2d 737 (1938) the Supreme Court said " . . . after the time for appeal has expired, the court has no power to modify a judgment in a substantial or material respect. This is well settled law." Since there was neither an appeal of the judgment, nor a timely modification attempted, it certainly cannot be changed now that the Plaintiffs wish to renew it.

DEFENDANTS ARE ENTITLED TO AMOUNT OF PLAINTIFFS' BID PLUS EQUITABLE OFFSETS AS CREDITS AGAINST THE JUDGMENT, WHATEVER IT IS.

The parties dispute whether additional credits should be allowed towards the judgment, whatever it is. Depending on the total amount, the judgment may have been paid. Plaintiffs admitted that they have bid amounts which have not been credited on the judgment. December 3, 1986 Defendants bid the sum of $20,000, plus costs, against the judgment. Plaintiffs refused to credit this because they do not think they are obligated to credit their bid.

Plaintiffs' bid was an irrevocable offer. Rule 69(e)(4), U.R.C.P. says that the failure of a purchaser to pay the bid is contempt of court. Plaintiffs admitted to making the bid, and now claim that Rule 69(g)(2) U.R.C.P. excuses them from payment. Actually, Rule 69(g)(2) U.R.C.P. only allows the purchaser to be exempt from his bid if there are irregularities in the proceedings of the sale or the property sold was not subject to execution and sale. Moreover, Rule 69(g)(2) U.R.C.P. is only to give third party purchasers at a sale either a judgment against a creditor or a judgment against a debtor if the third party purchaser does not end up with the property bid for. It does not address the question of what happens if the Plaintiffs themselves bid for the property, but regret the bid later.

In oral argument, Plaintiffs said that the Defendants alleged irregularity. They offered to provide evidence of this. They did not provide the evidence in their Memorandum. The Defendants have not argued irregularities in the sale or anything else sufficient to allow the Plaintiffs to be excused from the requirement that they credit the bid. What Defendants did was to argue before the sale that there should be no execution sale because Defendants had no equity in the property, notwithstanding, Plaintiffs went ahead. They cannot now say they should not have to pay. Rule 69(e)(4) U.R.C.P. provides:

> <u>Every bid shall be deemed an irrevocable offer</u>; and if the purchaser refuses to pay the amount bid by him for the property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss is occasioned thereby, the party refusing to pay, in addition to being liable on such bid, is guilty of a contempt of court and may be punished accordingly. When a purchaser refuses to pay, the officer may also, in his discretion, thereafter reject any other bid of such person. (Emphasis added.)

The Plaintiffs have neither admitted nor alleged specific irregularities in the sale. They have not alleged that the property should not have been sold. Such an allegation by Plaintiffs is not likely now. After all, one of the issues in the Amended Counterclaim is whether they wrongfully proceeded to sell the property. Perhaps Plaintiffs regret the bid because they acknowledge that Defendants had no equity in the property. Nevertheless, they sold all of Defendants' right, title and interest, and bid a certain amount for it, and they must be compelled to enter a satisfaction of judgment for the amount bid. This must be done before there can be determination made of what is owed on any possible renewal judgment. While it is true that Defendants opposed the sale, after the sale they did not allege irregularities or any basis for Plaintiffs to now claim their bid is not binding on them. Plaintiffs were represented by counsel and insisted on the sale; and even if they get nothing for the bid, they are obligated to credit the judgment with the amount bid. In <u>Randall v. Valley Title</u>, 681 Pac. 2d 219 (Utah, 1984) the Utah Supreme Court required a creditor bidding at a sale to credit his judgment and discharge the claim to the extent of the bid.

April 24, 1987, this court required the Plaintiffs to enter a partial satisfaction for the $20,000, plus costs of sale bid. This has never been done, and is apparently a disputed material question of fact. Such a requirement went beyond the court's Memorandum Decision of ~~December~~ September 12, 1986 in Civil No. 17630 where the court told the Plaintiffs that as to any amounts Plaintiffs acknowledge receipt of that are not shown as partial satisfactions, that these should be acknowledged in the dockett book. Where the Plaintiffs have acknowledged they made the bid and have not entered the partial satisfaction, it is also apparent that the bid should be credited to the judgment. If it is not, there is certainly a material issue of fact to be resolved <u>before</u> any summary judgment can be seriously considered by any court that has reviewed the pleadings.

The Order entered April 24, 1987 provides in the Findings of Fact:

> 9. Plaintiffs have not filed partial satisfaction of judgment required after the December 3, 1986, sheriff's sale, where $20,000 was paid by the Plaintiffs toward the judgment.

The Conclusions of Law in the same Order provided:

> 7. Plaintiffs are required to first enter partial satisfaction of judgment from the sale of one Defendant's interest in property from December 3, 1986.

From the foregoing, the court granted the Defendants' motion to quash and struck with prejudice the subpoenas duces tecum the Plaintiffs tried to get the court to enforce.

EQUITABLE OFFSET FOR STOCKING PROPERTY

The court has received affidavits from Von Stocking setting forth the basis for an equitable claim against the Plaintiffs and their counsel against the value of this judgment for the equity taken from Mr. Stocking and his wife by the Plaintiffs. August 29, 1983, the attorney for the Plaintiffs wrote a letter, previously entered with the pleading dated April 20, 1987. The letter written by Mr. George Daines admitted that Von Stocking's property was worth between $45,000 and $60,000. The letter attested to the fact that some of the equity in that property should go to offset the judgment that the Plaintiffs now seek to renew. Even by Plaintiffs' own admission in the letter, the equity in that property was between $11,808.06 and $26,808.06. A material issue of fact exists as to the amount, if any, of this equity that should be credited against the judgment. Mr. Stocking's affidavits support the conclusion that the issues in the Counterclaim are valid claims against the Plaintiffs and their attorneys. Referencing the subject matter of Von Stocking's property being credited to this judgment, the letter from Mr. Daines, dated August 29, 1983, says in part:

> Norm Barber and I have examined the Von Stocking home and believe that its worth would probably be somewhere in the range of $45,000 to $60,000 (first paragraph).
>
> . . .

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> Anticipating that this (sic) is going to take several weeks to determine what the appraisal of that home is and the likelihood that the home is insufficient to pay the full amount of the judgment, I think it is advisable that we continue with the Supplemental Order that was started this week. (Third paragraph.)

Read together with the affidavits of Mr. Stocking, it is clear that an equitable offset is owed to the Plaintiffs for this property, which the Plaintiffs acquired for $33,191.94 on November 4, 1983. The difference between $33,191.94 and $45,000 is $11,808.06, and between $33,191.94 and $60,000 is $26,808.06. Either amount makes a material difference to what could be owed on a renewal judgment, if any.

LEGAL ISSUES OPPOSING SUMMARY JUDGMENT

Besides the material fact questions discussed in detail heretofore, there are numerous legal questions which have been raised by the affirmative defenses, but not briefed by Plaintiffs in their motion. Defendants refer the court to prior pleadings filed in this action, including Defendants' Motion to Strike, filed in August, 1987 and the Memorandum and Reply Memorandum in support thereof. See also the memorandums supporting Defendants' in their Motion to Dismiss and Strike, filed on or about April 20, 1987 and May 8, 1987. While some of the matters are beyond the partial summary judgment motions here, the legal questions addressed in the affirmative defenses by the Defendants still stand.

Plaintiffs acuse Defendants of wrongfully filing an Amended Counterclaim and a Third Party Complaint seeking damages not only against Plaintiffs, but also their counsel. These pleadings, however, were not filed until after the Plaintiffs first filed an Amended Complaint which added the so-called Second and Third Causes of Action. That brought the pleadings well beyond a mere rubber stamp renewal of the judgment. Even though this was all done previous to the Appeals Court decision in February of 1988, the Appeals Court decision did not address the legal issues or merits of this case, and all of these legal questions still exist.

The Amended Counterclaim and Third Party Complaint are justified because the Plaintiffs failed to credit bids and enter equitable offsets to this judgment that their own letters or orders of this court require. Where they have knowingly failed and refused to deal fairly, Defendants are entitled to bring a Counterclaim and seek the damages prayed for. If in the past the court has failed to recognize the validity of the Defendants' claim, particularly that the initial judgment cannot be expanded merely by liberal drafting of writs and loose reading of pleadings, the court can still correct the Plaintiffs. It must restrict them to a renewal of only the actual judgment, once all the material facts have been resolved.

CONCLUSION

Plaintiffs have repeatedly admitted they are applying post judgment interest. The legal availability of that right has been shown by this pleading and prior arguments to not exist. It is time the court addressed this issue thoroughly, because it has not been addressed on the merits heretofore. The pleadings made on behalf of Defendants have not been frivolous, are made in good faith, and are consistent with what the Supreme Court and the statutes of this State have provided. It also recognizes the limitations of the Plaintiffs' initial pleadings. Defendants request this court restrict the Plaintiffs to those pleadings.

The Plaintiffs have not provided any authority as to why they should not credit the $20,000, plus cost of sale bid. They have not provided any authority or justification why they should not make an equitable offset from Mr. Stocking's equity. They have provided no authority for how a writ of execution on a judgment can somehow amend the judgment to the advantage of the Plaintiffs when they later seek to renew it. They have not provided a list of undisputed facts which they claim are undisputed. Numerous material facts exist. There are also substantial legal questions which foreclose the granting of any of the motions for summary judgment or the other motions before this court.

At some point in time, Defendants are entitled to have argued and presented the questions of post judgment interest. This has never come before this court or the Appeals Court and needs to be thoroughly addressed by this court at this time.

The court should reject the motions for partial summary judgment and the motion for sanctions. The court should also consider dismissal of the renewal judgment effort because it clearly goes beyond the scope allowed by the initial judgment. Defendants argued in open court that if the renewal effort was merely an effort to rubber stamp the prior judgment that there would be less defense, once the credits and offsets were resolved. Defendants have demonstrated a sufficient basis to show that the original judgment may already have been satisfied. The court could only go ahead on what damages the Defendants are entitled to for excess recovery by the Plaintiffs. Plaintiffs have tried to expand this effort beyond all legal reason or justification. Their efforts are not equitable and not justifiable. The court should take whatever steps are necessary to restrict any possible renewal judgment to the limits allowed by the underlying judgment. The court cannot correct prior mistakes in that underlying judgment, and is itself bound by the errors of counsel made on behalf of Plaintiffs.

Each of the affirmative defenses discussed herein or referred to was <u>not</u> resolved by the Appeals Court decision of February 12, 1988. That decision limited itself solely to the question of the timeliness of an appeal from the underlying judgment. It did not address the merits of the questions raised herein, but limited itself solely to the timeliness issue. The factual issues before this court include: What is the amount of the prior judgment? Has that judgment been paid? Should there be equitable offsets against the judgment? Are the Plaintiffs required to honor the bids they have made? What amount, if any, should be renewed? The

Plaintiffs' fraud or misrepresentation in seeking to enforce this judgment is an issue raised by the original Counterclaim and Third Party Complaint. Legal issues that exist in this court include the jurisdiction of this court to enter a judgment against the partnership or general partners where the partnership is in bankruptcy. Also, whether a judgment can be renewed against joint obligors where Von Stocking may have been released by negotations between himself and George Daines. Whether the Plaintiffs can seek additional attorney's fees is an issue. The statute of limitations has been raised as a defense to all efforts to expand from the literal terms of the judgment. Factually, except for the questions of amount of judgment and payment, a rubber stamp renewal of the previous judgment's exact language, with all its failings could be proper. However, these material issues of fact and the legal issues that oppose Plaintiffs restrict entry of any partial judgment at this time. The motions should all be rejected.

Dated this 16 day of August, 1988.

Raymond N. Malouf
Raymond N. Malouf

CERTIFICATE OF MAILING

I hereby certify that on the 17th day of August, 1988, a true and correct copy of the foregoing DEFENDANTS' RESPONSE TO SUPPLEMENTAL MEMORANDUM, OPPOSING PENDING MOTIONS, Civil No. 25616, was mailed postage prepaid to the following:

N. George Daines, Esq.
DAINES & KANE
108 North Main
Logan, Utah 84321

Secretary

134:EMPBAR.RMP

Tab 12

Raymond N. Malouf/bh #2067
Attorney for Defendants and
Third Party Plaintiffs
150 East 200 North, Suite D
Logan, Utah 84321
Telephone: 801/752-9380

IN THE FIRST JUDICIAL DISTRICT COURT
FOR CACHE COUNTY, UTAH

NORMAN BARBER and HELEN BARBER,

Plaintiffs,

vs.

THE EMPORIUM PARTNERSHIP, et al.,

Defendants and Third Party Plaintiffs

vs.

N. GEORGE DAINES and
DAINES & KANE,

Third Party Counterclaim Defendants

NOTICE OF OBJECTIONS TO PROPOSED FINDINGS AND JUDGMENTS AND REQUEST FOR FINAL RULING

Civil No. 25616

COME NOW the Defendants and give notice of their objections to the proposed Findings and Judgments being held by the Court for consideration after September 12. These objections are given pursuant to Rule of Practice 2.9. They pertain to the proposed Findings and Judgments entered as a result of the August 22, 1988, Memorandum Decision issued by this Court. That Memorandum Decision pertained to Plaintiffs' Motion for Partial Summary Judgment on (1) the first Cause of Action and initial Counterclaim and (2) the Amended counterclaim and Third Party Complaint. The Court granted

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partial summary judgment on the first Cause of Action, the initial Counterclaim and the Amended Counterclaim. Defendants want the benefit of Rule 54(b), U.R.C.P., and request that any order entered be certified as a final order.

The objections are as follows:

1. THE PROPOSED FINDINGS AND JUDGMENTS ATTEMPT TO EXPAND JUDGMENT AGAINST THE DEFENDANTS FROM A JOINT JUDGMENT TO A JOINT AND SEVERAL JUDGMENT. The original Judgment on April 18, 1979, said:

> It is hereby ordered, adjudged and decreed that the Plaintiffs have recovered judgment against the Defendants in the amount due on a promissory note in the amount of $15,000 plus accrued interest at the rate of 12% per annum from date hereof until paid in the amount of $2,180, attorney fees in the amount of $4,000 and Court costs in the amount of $31.30.

Any renewal judgment should be limited to the specific language, considering particularly that it (1) says nothing about joint and several liability and (2) only allows $2,180 of interest which was consistent with the Complaint that specifically asked for interest at 12% until judgment. The renewal judgment is only changed by getting a new date. A renewal judgment is not an amended judgment. The only variations that should be permitted by the Court are adjustments for payments or credits.

Neither the original Judgment nor the Complaint used the words "jointly and severally". It is impermissible for a renewal judgment to insert the language "jointly and severally" where it did not exist in the original Judgment. The original Complaint did not allege joint and several liability, and statutes provided liability could only be joint.

The Complaint to renew the Judgment never alleged joint and several liability, either. The relevant section of the Utah Code, Section 48-1-12, makes a distinction between joint liability and joint and several liability. Any renewal judgment may not make the Defendants jointly and severally liable where the prior judgment did not. This would be an impermissible modification of the prior Judgment, an amendement unsupported by fact, law or pleadings. Conclusion of Law No. 6 and the Partial Summary Judgment must be changed to remove all statements about joint and several liability. As will be shown in Point No. 4, the form should be further modified because of this issue.

2. PLAINTIFFS HAVE MISCALCULATED THE AMOUNT DUE. The total of the sums represented by the initial Judgment is $21,211.30. Of that, $2,180 is interest. Interest is allowed in that total sum only. The Court has made an interlocutory ruling here that calculating more interest is not a modification of the first Judgment. Even if that is so, the form of the Judgment has interest calculated on interest and is thus in the wrong amount for March 25, 1987. The form then proceeds to calculate interest on the total amount after that date. This amounts to again charging interest on interest, which has not been allowed by this Court. Also, in considering the $866.47 offset, since that amount was considered paid December 31, 1982, interest should be calculated on that figure from 1982 to determine the amount to be subtracted

from the total.

In addition, proposed Finding of Fact No. 6 and Conclusion of Law No. 7 refer to a later determination of the effect of Plaintiffs' $20,000, plus costs, bid made December 3, 1986. The alleged costs of the renewal complaint probably include the costs of that bid. No cost affidavit has been submitted. It is inappropriate for any partial judgment to enter for a total amount, where about half the total, the offset for the bid, is reserved. The total sum of any partial Judgment should be reduced by the amount of $20,000 plus the costs of the Sheriff's sale as of December 3, 1986. Requiring the Plaintiffs to do this now would be completely consistent with this Court's April 24, 1987 ruling in Civil No. 17630 requiring the Plaintiffs to enter a partial satisfaction for the $20,000 plus the costs of the sale. That has never been done, and it is contemptuous for these proposed pleadings to not do it now. Requiring that this reduction be made now, before partial judgment is entered is consistent with the Court's prior ruling and proper under the circumstances. This was an issue which was previously decided, and the Court should require the Plaintiffs to follow its prior ruling.

3. THE DEFENDANTS NEED TO BE IDENTIFIED PROPERLY. The Complaint to renew the Judgment named the partnership and the three alleged general partners of The Emporium Partnership. Of the three partners named, Don A. White, Jr., has never appeared. The Court clearly lacks personal jurisdiction over him. He is not a party to this action. Therefore, he cannot be a party to the Partial

Summary Judgment. Therefore, the Judgment cannot be entered against "the Defendants", using that term. It must be entered only against the Defendants who are actually parties to the lawsuit, and except Don White, if any Judgment is to be entered at all.

4. THE COURT CAN NO LONGER GET JURISDICTION ON MR. WHITE, SO "JOINT LIABILITY" CAN NO LONGER EXIST, OR THE JUDGMENT MUST BE FURTHER REDUCED. Don White was not even served. The Complaint to renew the Judgment was filed March 27, 1987, some 17 months prior to the entry of the Court's August 22, 1988, Memorandum Decision allowing partial summary judgment. Rule of Civil Procedure 4(b) requires that the Summons must be served within one year of the filing of the Complaint or the action is deemed to be dismissed. However, where some of the Defendants were served, the others may be served or appear at anytime before trial. If the Court is going to grant partial summary judgment on the first Cause of Action, then there never will be anything for Don White to be in trial about. Therefore, the summary judgment proceeding has to be considered all the trial he could have had if he had been a party. He was not, and it is too late for him to be served. A separate action cannot now be brought against him because it would be commenced beyond eight years after the original Judgment. Thus, Don White is out of the case because of the actions of the Plaintiff and the decision of the Court to grant judgment now. This action of the Plaintiff should be considered equivalent to a release of a co-obligor, and the results should be governed by Utah Code Section 15-4-5. That Section provides that if an obligee

(Barbers) releases an obligor (White) without reserving rights against co-obligors (Stocking, Malouf, The Emporium) but knows the obligor released (White) did not pay his share of the debt, then the obligee's (Barbers') claim against a co-obligor shall be satisfied to the amount which the obligee knew or had reason to know that the discharged obligor was bound to pay. If the obligee didn't know the obligor hasn't paid what he's supposed to pay, the claim against the co-obligor still has to be reduced by the amount of the fractional share released.

The foregoing means that Don White's share of the debt, whatever it was, should be subtracted from the Judgment awarded in the First Cause of Action. Heretofore, Plaintiffs alleged each of the Defendants owed one third. This was disputed in the prior action, where it was argued that ex-Defendant Don White owed more than one third. Even giving the Plaintiffs the benefit of their argument, the total debt and proposed Judgment should be offset by at least 1/3 because one joint obligor has been released. Or, before entry of the partial Judgment a hearing must be had to determine the amount of reduction for what his share was.

This argument relates to the issue of "joint and several" liability. Because this Judgment is a joint liability judgment, rather than a joint and several liability judgment, several liability on the whole sum cannot be had against the other obligors. In fact, because this judgment never was joint and several, a new Judgment should not enter at all. There is a difference between joint liability and joint and several liability.

The previous reference to U.C.A. Section 48-1-12 is a beginning distinction. In the prior action, this issue was collaterally approached by both parties in an effort to allow collection only of proper shares from each defendant. Here the distinction is used to see whether there can even be a judgment. In the prior argument, there was disagreement. However, applying only the Plaintiffs' own argument, it is at least correct that a difference between "joint liability" and "joint and several liability" is that in a joint and several liability situation one can proceed against one party in the legal action without joining the other parties. On the other hand, where there is only joint liability, the Plaintiff is required to proceed against all of the parties (see Mr. Daines' pleading in Civil No. 17630 dated September 4, 1986, page 3). Since Plaintiffs did not proceed against all parties, they should not get judgment against any.

Certainly it is too late to change the original Judgment from joint liability to joint and several liability. (The Court itself has said the original judgment is fixed.) In this case, joint and several liability was neither pleaded nor granted. Therefore, the Judgment may only be joint, and Don White had to be joined as a party in order for there to be renewal judgment. Since he was not, there can be no Judgment entered. Prior rulings of this Court do not address the question of whether a judgment can be entered against some, but not all of the Defendants, but only address the question of whether the Plaintiffs could proceed to collect individually against joint Defendants. The Court allowed them to, but that judgment has expired. Now Plaintiffs chose not to proceed against all joint obligors. Accordingly, Judgment cannot be entered now because there was never joint and several liability. It is too late for there to be joint liability, because Don White was released by Plaintiffs.

Sufficient reasons have been shown to show why there should be no partial judgment entered. The nature of the original Judgment forecloses a renewal judgment unless the Judgment is renewed against all of the Defendants. It can't be because one of the joint obligors is not a party to the action. Alternatively, and only if this argument is rejected, Defendants submit that the judgment must be reduced by Don White's share and the Findings and Conclusions must be restricted to only provide judgment against the two Defendants who are actually parties to the action.

6. THE COURT OF APPEALS RULING DID NOT DEAL WITH SUBSTANTIVE ISSUES. It addressed only timeliness. Therefore references in Finding of Fact No. 7 and Conclusion of Law No. 8 should not refer to that decision. The Memorandum Decision did not refer to it.

7. THE AWARD OF ATTORNEYS' FEES IS NOT SUPPORTED BY PROPER FINDINGS. The proposed form of Findings and the Judgment refer to the $3,000 for attorney fees awarded as a penalty for seeking remedies after issues have been settled, and repeating arguments "although the wording may be different". Yet, there were no pleadings asking for attorneys' fees on the partial summary judgment. The Motions for Partial Summary Judgment did not include a request for attorneys' fees. Plaintiffs suggested this issue be

deferred. No fee affidavits were submitted. There was no evidence to justify a finding for attorneys' fees in any amount. Under U.C.A. Section 78-27-56, the Court can only award <u>reasonable</u> attorneys' fees to a prevailing party if the Court determines that an action or defense of the action was without merit and not brought or asserted in good faith. The Court made no such findings. The Court ought to be able to justify the amount of its award, and have made findings supporting it. Instead, the Court found the Plaintiffs were burdened by more legal fees to answer matters previously adjudicated. However, there was no basis to find Plaintiffs were burdened with attorneys' fees. It is only assumption. The case may be with Plaintiffs' attorney on a contingency fee arrangement.

Where is the Court's analysis? If requests of Defendants were previously decided, a fact disputed by Defendants, why couldn't the Memorandum Decision refer to what they were and where they had been decided? Defendants had just submitted a detailed list of disputed facts and legal arguments about the amount of judgment and offsets. To expect a reasoned decision is reasonable and not asserted in bad faith. For example, the Appeals Court said the timeliness of the issues raised was the reason it was rejecting Defendants' claims in the appeal. Somehow Plaintiff thinks that resolves the post judgment interest issue. Yet, nowhere has the Appeals Court said that the language of the original Judgment was amended by issuance of a Writ not in conformity with the judgment's language. Since the prior judgment was allegedly not paid, writ language is moot. Moreover, this Court has never addressed the question of how the judgment language, referred to verbatim in the first paragraph of these objections, has ever been stretched to provide for post-judgment interest. Defendants' brief pointed out where Plaintiffs admitted the judgment language had problems. Assuming arguendo the Court has ruled on that issue, it could only have done so in the context of execution writs which have never been satisfied. Since the writs were not satisfied any effort to renew the judgment should refer to the prior Judgment itself, not the writs. May 18, 1987, in a Memorandum Decision the Court said interest on the judgment wasn't a modification. Where was the analysis? There hasn't ever been one. The only basis to say that the post-judgment interest question has been resolved is to say a writ amends a judgment. Writs do not amend judgments. This Court, the Plaintiffs and the Defendants have all said it is too late to amend the original Judgment. The Court should make an analysis of the language and Complaint from the prior judgment and explain itself clearly at some point. If it has, to find contempt it should be able to point to a violation of a clear previous order. Where has the Court ruled on the post judgment interest issue?

Another major argument raised by Defendants was that of offsets for Von Stocking's home and for the bid of $20,000. Defendants argued the ruling requiring that the $20,000 be credited before Plaintiffs proceeded. There are no findings to justify penalizing Defendants for arguing the bid must be credited before a Judgment is entered. Where is the explanation the bid was not an irrevocable offer? The Court required crediting the bid in its order. Plaintiffs should be in contempt for not doing it. Where is the analysis that this argument is not well taken? The equitable argument for Mr. Stocking's offer is only redundant if the Court considers that it is an issue also raised in another suit, Stocking vs. Barber. In granting partial summary judgment in this action, the Court must be reserving Mr. Stocking's claim against Barbers in the other action. Where is the analysis to explain why a factual issue there is not also a factual issue here? Defendants tried to relate the two actions.

No penalty of the nature imposed by the Court is supportable by the pleadings. No basis for the amount of the award was shown. Where there is insufficient evidence of the reasonableness of attorneys' fees, their award must be vacated. See Associated Industrial Development, Inc. vs. Jewkes, 701 P.2d 486 (Utah 1984). The Memorandum Decision cannot support specific findings. Defendants are entitled to a hearing to refute assumptions the Court makes. The Court should not enter contempt findings or judgment in any form.

The form improperly adds the name Malouf Law Offices in Findings No. 1 and 5, and Conclusions 1 and 5. The Court used the word "he" in referring to Defendants' counsel's alleged contempt, and any findings or judgment should be limited solely to the individual referred to. Plaintiffs are not entitled to gratuitously insert the name of the law firm.

8. DEFENDANTS' COUNSEL HAS BEEN DENIED DUE PROCESS. If the

Court is to make a finding of contempt, the Court is obligated to follow the procedures in U.C.A. Sections 78-32-3 and support it by an affidavit; Section 78-32-10 and allow a hearing on the issue; and Section 78-32-11 and make sure the hearing determines actual loss or injury.

The undersigned believes the Utah Statutes on this civil contempt issue have been ignored, and the Court had insufficient information to make its decision. No prior rulings have been violated by Defendants. No findings or conclusions justify entry of a Judgment for contempt.

9. THIS MATTER SHOULD BE CERTIFIED AS FINAL ORDER. Pursuant to U.R.C.P. Rule 54(b) if the Court enters any partial summary judgment against the Defendants in this case or on the contempt issue, the undersigned respectfully requests that the Court certify any order actually entered as a final judgment for this part of the case, under Rule 54(b). Defendants request this so they may file an immediate appeal. Multiple parties are involved, but the other parties still involved are not subject to the First Cause of Action or the contempt proceeding.

DATED this 12 day of September, 1988.

Raymond N. Malouf

Raymond N. Malouf

CERTIFICATE OF MAILING

I hereby certify that on the 12th day of September, 1988, a true and correct copy of the foregoing NOTICE OF OBJECTIONS TO PROPOSED FINDINGS AND JUDGMENTS, Civil No. 25616, was mailed postage prepaid to the following:

N. George Daines
DAINES & KANE
108 North Main Street, Suite 201
Logan, Utah 84321

Barbara Harrison
Secretary

N. George Daines - 0803
Attorney for Plaintiffs
DAINES & KANE
108 North Main, Suite 200
Logan, UT 84321
Telephone: (801) 753-4403

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

NORMAN BARBER and HELEN BARBER, husband and wife, Plaintiffs, vs. THE EMPORIUM PARTNERSHIP et al., Defendants and Third Party Plaintiffs, vs. N. GEORGE DAINES and DAINES & KANE, Third Party and Counterclaim Defendants.	*	RESPONSE TO OBJECTIVES Civil No. 25616

COME NOW the Plaintiffs' and respond to Defendants' objections as follows:

1. Joint Liability: The form of the judgment tendered now requests joint liability only.

2. Amount Due: The amount due is correct and has repeatedly been held correct by the court.

3. Defendants': Attorney Malouf entered an appearance for all the Defendants' with his Amended Answer and Counterclaim. All Defendants' are therefore before the court.

4. Award of Attorneys Fees: The attorneys fees awarded are based upon Rule Sanctions they are not based upon the request set

Number [illegible]

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forth in the Complaint. Given that the court is proceeding on the basis of sanctions it is free to decide sanctions on its own basis. The court is not is not basing its sanctions on any proof of attorney hours or time involved. The order presented has been corrected to clarify that situation.

WHEREFORE Plaintiffs' pray that the court deny Defendants' remaining objective and enter the order as amended.

DATED this ___[illegible]___ day of September, 1988.

DAINES & KANE

N. George Daines

CERTIFICATE OF MAILING

I hereby certify that on the ___[illegible]___ day of September, 1988, I mailed a true and correct copy of the foregoing RESPONSE TO OBJECTIONS to the following:

Raymond N. Malouf, Jr.
MALOUF LAW OFFICES
150 East 200 North, Suite D
Logan, UT 84321

Secretary

Raymond N. Malouf/md (#2067)
MALOUF LAW OFFICES
Third Party Plaintiffs
150 East 200 North, Suite D
Logan, Utah 84321
Telephone (801) 752-9380

IN THE FIRST JUDICIAL DISTRICT COURT FOR CACHE COUNTY

STATE OF UTAH

NORMAN BARBER and HELEN BARBER, Plaintiffs, vs. THE EMPORIUM PARTNERSHIP, et al. Defendants and Third Party Plaintiffs vs. N. GEORGE DAINES and DAINES & KANE, Third Party Counterclaim Defendants.	NOTICE OF OBJECTIONS TO SECOND PROPOSED FINDINGS AND JUDGMENTS, AND REQUEST FOR FINAL RULING Civil No. 25616

COME NOW the Defendants to this action and give notice of their objections to the Second Proposed Findings and Judgments mailed September 16, 1988. Plaintiffs made some small changes to the proposed forms from nearly identical pleadings previously offered. The court already received Defendants' Notice of Objections to those proposed findings and judgments. The objections, dated September 12, 1988, are still applicable to the Second Proposed Findings and Judgments. Rather than repeat the arguments, Defendants incorporate those objections by reference here, and further respond to the short response of the Plaintiffs as follows:

1. The second proposed form of the findings and judgment replaced the words "joint and several" with "joint", evidencing Plaintiffs' acceptance of Defendants' argument that, since the original judgment did not plead or allow judgment to be "joint and

SETH S. ALLEN, Clerk
Deputy

several", neither should this one. However, even joint liability does not exist because Don A. White, Jr. was not made a party and joined in the suit. This is explained fully on pages 3 through 8 of the September 12, 1988 Notice of Objections. Plaintiffs say the Amended Answer was on Don's behalf too, but that is not correct. Why it is not correct is explained in point 3 herein.

2. The amount due is no more correct than it was before. The same figures were again used. Plaintiff has not justified them. The court has not "repeatedly" held this amount to be correct. What the court has repeatedly done, over Defendants' objections, is refuse to quash writs of execution on the old and prior judgment in amounts in excess of what that judgment allowed. That judgment has expired. The renewal judgment form must be limited to the actual language of the first judgment, not writs. If the court enters the proposed form of the judgment, it will be allowing interest on interest. It will also not be properly crediting the one offset Defendants admit, the $866.47, paid December 1, 1982. The proposed judgment still includes no offset for the Plaintiffs' bid of $20,000, plus costs. That issue the Plaintiffs propose to resolve by having the court decide it at a later date. Obviously, if it needs to be decided at a later date, there are disputed questions of fact and law which have not been resolved. Summary judgment should not enter if there are disputed issues to warrant a trial. Bennion v. Amass 28 Utah 2d 216, 500 P.2d 512 (1972). The form presented by the Plaintiffs should not be used for a renewal judgment.

3. It is absolutely untrue that an appearance for the Defendant Don A. White, Jr. was made or intended by the Amended Answer and Counterclaim. Mr. White was never before the court, as is shown by the history of the appearances and the pleadings on this subject:

a. The Complaint was filed March 27, 1987;

b. Raymond N. Malouf filed a Motion to Dismiss and to Strike on his own behalf about April 20, 1987;

c. May 4, 1987, Von K. Stocking's appearance by counsel was accepted by the court;

d. May 8, 1987, an entry of appearance for Von K. Stocking was made in which he joined in Mr. Malouf's motion;

e. On the same date, May 8, 1987, "The Defendants appearing herein" filed a Reply in Support of Defendants' Motion to Dismiss and to Strike. The reference to Defendants obviously could only be to the two Defendants who had appeared;

f. An Answer and Counterclaim on behalf of Von Stocking and Ray Malouf was filed about July 23, 1987. The Answer began in this fashion:

> COME NOW Defendants Von K. Stocking and Raymond N. Malouf, Jr., the only Defendants who are parties to this action, and reserving the right to answer for Don A. White, Jr., if and when he becomes a party, answer the allegations of the Complaint as follows:

Among the defenses enumerated in the Answer was the Ninth Defense, which alleged Plaintiffs had waived or compromised their claim against each of the answering Defendants, either by specific agreement to release, operation of law, or latches. There is and was no evidence that a Summons had issued to be served on Don A. White, Jr, or that Don became a party.

g. Plaintiffs filed their Amended Complaint about July 23, 1987, more than 3 months after the Complaint was filed. The lead paragraph said Plaintiffs re-stated their original Complaint as the First Cause of Action. They also added additional parties as Defendants to a Second and Third Cause of Action. Those parties were separately served with Summons, unlike Don White. One of those additional parties was Logan Savings and Loan Association.

h. The Amended Answer and Counterclaim was filed about September 23, 1987, after some motions. The lead paragraph and answer to the First Cause of Action read as follows:

> COME NOW Defendants herein, with the exception of Logan Savings and Loan, which is not represented by the undersigned, and Answer the Amended Complaint, Counterclaim and claim as follows:
>
> ANSWER TO FIRST CAUSE OF ACTION
>
> Defendants incorporate by reference, as if fully set forth herein, the Answer and Counterclaim filed July 23, 1987, together with each of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Defenses set forth therein.

The original Answer and Counterclaim, which specifically excluded Don A. White, Jr. (item "f" above) was preserved. Obviously, answering on behalf of all Defendants herein except Logan Savings and Loan was not the same as an entry of appearance for Don A. White, who had not been served. The "Defendants herein" did not include Don A. White. He was only a potential Defendant to the First Cause of Action. The original Answer and Counterclaim was not filed on behalf of Don A. White. It specifically made mention to the fact that he was not a party, and counsel reserved the right answer for him when he became a party, if ever. The Amended Complaint did nothing to make him any more a party than he already was. Neither did the Amended Answer. Plaintiffs were on notice from July 23, 1987, at least, that Don White had not been made a party. If they wanted him included, they would have to serve him. Plaintiffs have not shown how Don White is a party in this action. The Amended Answer to the First Cause of Action incorporates language which excludes him by name. He is not a party in this action because he has not been served, no entry of appearance was made on his behalf, and no answer was made on his behalf.

Therefore, all of the objections discussed on pages 3 through 8 in the September 12, 1988 Notice of Objections are still valid. The judgment is not against Don White. Because the judgment is only joint and not joint and several, and no effort was made to join Don White as a party, Plaintiffs waived their claim, elected not to proceed against all obligors, and are not entitled to have the judgment entered now.

4. The attorney's fees proposed have not been justified. Plaintiffs have made some changes in the proposed form of the judgment. They leave the reference to contempt in, but add references to sanctions, saying the award is being made pursuant to Rule 11. The problem with this is two-fold: First, nowhere in the August 22, 1988, Memorandum Decision is reference made to Rule 11 sanctions. The only reference is to contempt. The objections already submitted show how the form of the findings and conclusions and judgment cannot be justified by Utah statutes on contempt. Apparently the Plaintiffs agreed with this, because they have gratuitously tried to solve the problem by references to Rule 11. Secondly, Rule 11 itself only allows sanctions if "a pleading, motion or other paper is signed in violation of the Rule". However, the court made no findings that any pleadings were in violation of the Rule. Moreover, the sanctions which are allowed by Rule 11 include only <u>reasonable</u> expenses incurred because of the filing of whatever pleading was involved, and only allow a <u>reasonable</u> attorney fee. The decision made by the court was not supported by any facts or findings about the reasonableness of expenses or attorney's fees. The objections previously made September 12, 1988, on pages 8 through 12 are all still very correctly taken. No argument against them has been made. The fact remains the court made its decision on insufficient information and the proposed form of findings and conclusions and judgments should not be entered.

If the court has made repeated findings in the past on the issues the Plaintiffs think are so very clear, the Plaintiff ought to be able to specifically refer to the analysis the court made. Plaintiffs have not provided a reference to any analysis to show how a prior judgment, which has expired, can be amended now by writs on the prior judgment, which have also expired. There is also no reference to any analysis to show why the court's April 24, 1987 ruling, (requiring Plaintiffs to enter a partial satisfaction for the bid of $20,000, plus costs), should not be followed before a judgment is entered. Where is that analysis? If the matter has been repeatedly adjudicated, and if the Plaintiffs have complied with that, why is the Plaintiff unable to cite the date and name of decisions to show all or even some of the "adjudications" and to show the reasoning used by the court? The answer is that the court was asked by Plaintiffs to accept statements by the Plaintiffs about conclusions which were not true. Plaintiffs lack evidence that the reasoning has been done in the past. In fact, it had not. The proposed findings and conclusions, even as changed, still are subject to the objections previously filed and should not be entered.

REQUEST FOR "FINAL RULING"

5. If the court enters any partial summary judgment against the Defendants in this case or on the so called contempt (which the Plaintiffs refer to as sanctions), the Defendants who are parties respectfully request that the court certify all orders actually entered as final judgments for this part of the case under Rule 54(b). This request is made so Defendants may file an immediate appeal. Even though multiple parties are involved, the other parties still involved are not subject to the First Cause of Action or the contempt proceeding.

Dated this 20 day of September, 1988.

Raymond N. Malouf

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of September, 1988, a true and correct copy of the foregoing Notice of Objections to Second Proposed Findings and Judgments, And Request for Final Ruling, Civil No. 25616, was mailed, postage prepaid to the following:

N. George Daines, Esq.
Daines & Kane
108 North Main
Logan, Utah 84321

Secretary